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o. 84-1103-CFH Title: William Lloyd Hill, Petitioner
tatus: GRANTED v.
A. L. Lockhart, Director, Arkansas Department of Correction

ocketed:
ecember 17, 1984 Court: United States Court of Appeals for the Eighth Circuit

Counsel for petitioner: Lassiter, Jack T.

Counsel for respondent: Clark, John Stever

ntry	Date	Note	Proceedings and Orders
1	Dec 17 1984	G	Petition for writ of certiorari filed.
3	Jan 18 1985		Order extending time to file response to petition until January 31, 1985.
4	Feb 2 1985		Brief of respondent Lockhart, Dir., AR DCC in opposition filed.
5	Feb 6 1985		DISTRIBUTED. February 22, 1985
6	Feb 25 1985		REDISTRIBUTED. March 1, 1985
9	Mar 11 1985		REDISTRIBUTED. March 15, 1985
10	Mar 18 1985		Petition GRANTED. Justice Powell CUT.
			**********
11	Apr 17 1985	G	Motion of petitioner for leave to proceed further herein in forma pauperis filed.
12	Apr 17 1985	G	Motion of petitioner for appointment of counsel filed.
13	Apr 29 1985		Motion of petitioner for leave to proceed further herein in forma pauperis GRANTED.
14	Apr 29 1985		Motion for appointment of counsel GRANTED and it is ordered that Jack T. Lassiter, Esquire, of Little Rock, Arkansas, is appointed to serve as counsel for the petitioner in this case.
15	May 20 1985		Joint appendix filed.
17	May 24 1985		Order extending time to file brief of respondent on the merits until June 22, 1985.
18	May 30 1985		Brief of petitioner William L. Hill filed.
19	May 31 1985		Record filed.
20	May 31 1985		Certified original record 8 C.A. proceedings, 2 volumes, received.
21	Jun 28 1985		Brief of respondent Lockhart, Director, AR DCC filed.
22	Jul 18 1985		SET FOR ARGUMENT, Monday, October 7, 1985. (2nd case)
23	Aug 7 1985		CIRCULATED.
24	Oct 7 1985		ARGUED.

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84-1103

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CLERK

No._____

In the

Supreme Court of the United States

October Term, 1984

William Lloyd Hill ..... *Petitioner*

V.

A.L. Lockhart, Director,
Arkansas Department of Correction ..... *Respondent*

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Is a state prisoner entitled to an evidentiary hearing in a United States District Court habeas corpus proceeding where the prisoner has pled in his petition that his state court negotiated guilty plea was involuntary and resulted from ineffective representation of counsel in that his attorney misadvised him as to his potential parole eligibility date and as a result of that advice the prisoner accepted the plea offer and entered the guilty plea?

LIST OF INVOLVED PARTIES

The involved parties are listed in the style of the case.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: Page

STATUTORY MATERIAL:

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REFERENCE TO THE OFFICIAL REPORT OF THE OPINION BELOW

The decision of the United States Court of Appeals for the Eighth Circuit is reported at 731 F.2d 568 (8th Cir. 1984). The decision of the United States District Court for the Eastern District of Arkansas, Western Division, was an unreported decision.

STATEMENT OF JURISDICTIONAL GROUNDS

The opinion of the United States Court of Appeals for the Eighth Circuit was filed on April 9, 1984, and appears in the appendix to this brief. A Petition for Rehearing en Banc was filed by the Petitioner. A Rehearing en Banc was

granted. An order was entered by an equally divided court affirming the judgment of the District Court on September 20, 1984. The mandate of the Eighth Circuit was issued on October 15, 1984. A Writ of Certiorari is sought from this Court pursuant to 28 U.S.C. §1254(1) and 28 U.S.C. §2101(c).

STATEMENT OF INVOLVED CONSTITUTIONAL PROVISIONS AND STATUTORY PROVISIONS

Amendment VI of the United States Constitution states—

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and District wherein the crime shall have been committed, which District shall have been previously ascertained by law and to be informed of the nature and cause of the accusation against him; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor and to have the assistance of counsel for his defense.

Amendment XIV of the United States Constitution, Section 1 states:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The jurisdictional basis of the United States District Court for the Eastern District of Arkansas rested upon 28 U.S.C. §2254. The appellate jurisdiction of the United States Court of Appeals for the Eighth Circuit rested upon 21 U.S.C. §1291.

The Petitioner William Lloyd Hill, a prisoner in the Arkansas Department of Correction, filed a "Petition for Writ of Habeas Corpus By Person In State Custody" with the United States District Court, Western District of Arkansas, Eastern Division, on June 30, 1981. That Petition, *inter alia*, attacked the voluntariness of a guilty plea entered in the Pulaski County, Arkansas, Circuit Court in 1979. The State of Arkansas had charged Mr. Hill with first degree murder and theft of property. The negotiated plea entered into by Mr. Hill resulted in a sentence of thirty-five years imprisonment for first degree murder with a ten year concurrent term on a theft of property conviction. In his petition for writ of habeas corpus, Mr. Hill alleged that his attorney informed him that he would only have six years to serve on his sentence if he "stayed out of trouble". He alleged that his attorney failed to inform him of the ramifications of Ark. Stat. Ann. §43-2828(2) and §43-2829(3), known as Act 93. These sections govern potential parole eligibility requiring a lengthier term for second offenders. As a result of a previous Florida conviction, Mr. Hill was a second offender under the act, and was not and is not eligible for parole consideration until having served one-half of his term less good time or approximately nine years. The United States District Court entered an order on March 2, 1983, denying the petitioner's request for an evidentiary hearing. Mr. Hill appealed to the United States Court of Appeals for the Eighth Circuit asserting that he was entitled to an evidentiary hearing in regard to the voluntariness of his plea and the competency of his court appointed attorney. The three judge panel of the Eighth Circuit by a two to one vote affirmed the decision of the United States District Court. Mr.

Hill petitioned for rehearing en banc. Rehearing en banc was granted. By a five/five split vote the Eighth Circuit Court of Appeals affirmed the decision of the United States District Court. The memorandum opinion of the United States District Court may be found herein in Section A of the Appendix and the opinion of the United States Court of Apeals of the Eighth Circuit appears herein in Section B of the Appendix.

QUESTION PRESENTED FOR REVIEW

Is a state prisoner entitled to an evidentiary hearing in a United States District Court habeas corpus proceeding where the prisoner has pled in his petition that his state court negotiated guilty plea was involuntary and resulted from ineffective representation of counsel in that his attorney misadvised him as to his potential parole eligibility date and as a result of that advice the prisoner accepted the plea offer and entered the guilty plea?

ARGUMENT

Mr. Hill asserts that the position taken by the United States Court of Appeals for the Eighth Circuit has resulted in the interpretation of an important question of federal law which has not been but should be settled by this court and further asserts that the United States Court of Appeals for the Eighth Circuit has taken a position in its holding in this case which is in conflict with the decisions of other courts.

The Petitioner Mr. Hill was charged with first degree murder and theft of property in the Pulaski County Circuit Court in Little Rock, Arkansas, in 1978. In 1979 Mr. Hill entered negotiated pleas to both charges. He received a sentence of 35 years on the first degree murder charge and a concurrent sentence of ten years on the theft of property charge.

In effect at the time of Mr. Hill's guilty pleas was a state law governing potential parole eligibility requiring service of a longer term for second offenders before they could become eligible for parole. Ark. Stat. Ann. §§43-2828(2) and 2829(3) (known among inmates as "Act 93"). Mr. Hill is and was a second offender under that act and was not and is not eligible for parole until having served one-half of his sentence with credit for good time. Mr. Hill contended in his petition for writ of habeas corpus that his appointed attorney advised him prior to entering the guilty pleas that he would be parole eligible after serving one-third of his sentence less good time (approximately six years). Petitioner alleged in his petition for writ of habeas corpus that his plea was not voluntary as a result of the erroneous advice of counsel and that he did not receive effective representation as required by the Sixth Amendment of the United States Constitution.

The United States District Court for the Eastern District of Arkansas, Western Division by Judge G.

Thomas Eisele found that Mr. Hill had failed to state an actionable claim under habeas proceedings and dismissed the petition without an evidentiary hearing. The case was appealed to the United States Court of Appeals for the Eighth Circuit. In a split decision the three judge panel affirmed. Following the granting of a petition for rehearing en banc, the Eighth Circuit Court of Appeals split evenly thereby affirming the decision of the lower court.

Mr. Hill contends that his counsel's erroneous advice concerning his parole eligibility date was a critical factor in his decision to enter the guilty pleas. As pointed out in the United States District Court's Memorandum and Order at 12, (Appendix A herein), Mr. Hill will have to serve at least nine years of the thirty-five years before he can become eligible for parole. If he were parole eligible as he had anticipated, he would have to serve six years before meeting the parole board. Therefore, Mr. Hill argues that his potential parole eligibility date was an important consequence of his plea upon which he alleges that his counsel misadvised him.

This Court has stated that a plea cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts. *Johnston v. Zerbst*, 304 U.S. 458, 468 (1938). The critical importance of the earliest potential parole eligibility date when negotiating a guilty plea cannot be ignored. Attorneys' affidavits were provided to the United States District Court (referred to in the Eighth Circuit's decision, Appendix B hereto at p. B-3) confirming the importance of an attorney's advice to his client concerning parole eligibility in negotiating pleas. These three affidavits were those of attorneys actively engaged in the practice of criminal defense work.

The United States Court of Appeals for the Eighth Circuit held that the information Mr. Hill allegedly received from his attorney regarding his parole eligibility was not

sufficient to render his guilty plea involuntary as a matter of law. (Appendix B hereto at p. B-7). Further, the United States Court of Appeals for the Eighth Circuit, relying on the reasoning of the United States District Court, found that it was undesirable that claimed misadvice on parole eligibility could potentially render pleas involuntary. That court held, "Further reasons articulated by the District Court make it undesirable that claimed misadvice on parole eligibility render the plea involuntary. The Petitioner's behavior and legislative and administrative changes in parole eligibility rules may affect this date. Every plea bargaining arrangement thus would be subject to reopening any time a Defendant did not become eligible for parole at the time estimated. We do not believe that the Constitution requires this conclusion." (Appendix B herein at B-7 and B-8). The decisions of other United States Circuit Courts of Appeals and state appellate courts are in conflict with the position of the Eighth Circuit set out in the language above.

The United States Court of Appeals for the Fourth Circuit regards as incompetent an attorney who wrongly informs a client contemplating a plea bargain that the client will spend less time incarcerated than the published law mandates. *O'Tuel v. Osborne*, 706 F.2d 498, 500 (4th Cir. 1983); and *Strader v. Garrison*, 611 F.2d 61, 63 (4th Cir. 1979). In *Strader, supra*, the defendant's lawyer assured his client that by pleading guilty and accepting a thirty year sentence to run concurrently with a prior sentence, the defendant would not extend his potential parole eligibility date. However, state law was different. His potential parole eligibility date was extended by several years as a result of the additional concurrent sentence. In *O'Tuel, supra*, the attorney failed to discover that the applicable statute for parole eligibility had been amended and consequently informed his client that he would be eligible for parole after ten years when he was actually ineligible for parole until serving twenty years. The *Strader* case describes the attorney's action as "gross misconduct". Following the

Strader standard, the Petitioner asserts that a difference in time served of three years before potential parole eligibility meets the *Strader* gross misconduct standard.

In *United States ex rel Ternullo*, 510 F.2d 844 (2d Cir. 1975), the United States Court of Appeals for the Second Circuit found that a defendant was entitled to an evidentiary hearing upon an allegation that his plea was involuntary as a result of the erroneous advice of his attorney as to potential parole eligibility dates. There the defendant had pled guilty to second degree robbery and had received a prison term of five to fifteen years. His attorney indicated in a letter that it was his understanding that the sentence was from five to fifteen years and that his client would be released on serving two-thirds of the minimum sentence with good behavior or approximately two years. The Court stated that the attorney's advice was clearly a misrepresentation of then existing New York law. Applicable New York law passed three years prior to the entry of the plea stated that a defendant sentenced to an indeterminate term would not be eligible for parole until he had served the minimum period fixed by the court. The Second Circuit found that the prisoner was entitled to an evidentiary hearing to determine whether his plea was rendered without understanding of his sentencing possibilities. The Court pointed out that counsel was not being second-guessed about a prediction which was proven inaccurate but rather from the statement of an easily accessible fact.

In *United States v. Baylin*, 531 F.Supp. 741 (Del. 1982) aff'd, 696 F.2d 1030 (3rd Cir. 1982) the Delaware District Court held that any unilateral expectation on a pleading defendant's part as to his likely date of parole, not induced by an "affirmative" misrepresentation (emphasis added) could not provide the basis for challenging a guilty plea. The holding suggests in dictum that an attorney's advice concerning a guilty plea where inaccurate may state grounds for post conviction relief.

As indicated above, certain state appellate courts have taken positions in conflict with the United States Court of Appeals for the Eighth Circuit. In *People v. Owsley*, 66 Ill. App. 3rd 234, 383 N.E.2d 271 (1978), the Illinois Appellate Court reviewed the order of a lower court judge summarily dismissing without a hearing a petition for post-conviction relief alleging that the defendant's trial attorney during plea negotiations misrepresented among other things the time the defendant would serve before becoming parole eligible. The appellate court held that it was error to summarily dismiss the petition. The Court held that the trial court should determine whether the allegations in the petition reviewed against the record of the guilty plea hearing were so palpably incredible, patently frivolous, or false as to warrant summary dismissal. See also, *People v. Ramos*, 472 N.Y.S.2d 339 (1984).

Mr. Hill does not contend nor does he need to reach the constitutional issue of whether the trial court should have inquired as to his understanding of his potential parole eligibility. Rule 24 of the Arkansas Rules of Criminal Procedure does not require such an inquiry nor do the Federal Rules of Criminal Procedure at Rule 11(C)(1). It should be noted that not all courts agree with that approach. A California appellate court has held that the failure by the Court to advise a defendant of a statute requiring a minimum term for parole eligibility renders a plea involuntary. *People v. Tabucchi*, 64 Cal. App. 3rd 133, 134 Cal. Rptr. 245 (1976). In *Tabucchi, supra*, the Defendant was sentenced to a minimum term of five years, and mistakenly believed that he would be parole eligible after serving one-third of the five year term. To his surprise he was not eligible for parole until he had served three years of the minimum term. The California Appellate Court held—

> Recognizing the critical importance to a defendant of the right to parole and recognizing the wide spread knowledge of persons charged with crime concerning

> the "one-third minimum time" parole policy of the adult authority in usual cases, we believe that notice to a defendant of any statutorily required minimum term for parole eligibility contrary to and of greater duration than the usual adult authority policy based on Penal Code, Section 3049, is constitutionally required as a prerequisite to entry of a guilty plea . . . such a minimum term for parole eligibility must be deemed a direct rather than a collateral consequence of the guilty *Tabucchi, supra*, 64 Cal. App. 3rd at 143, 134 Cal. Rptr. at 251.

The Illinois Supreme Court has held that the trial court's failure to admonish a defendant concerning a mandatory period of parole when accepting his guilty plea is a factor to be considered in determining the voluntariness of the plea. *People v. Wills*, 61 Ill.2d 105, 330 N.E.2d 505 (1975), and, see also, *People v. Blackburn*, 46 Ill. App.2d 213, 360 N.E.2d 1159 (1977).

Several state court appellate decisions address the effect of a trial court judge's misadvice to the defendant concerning his potential parole eligibility at time of sentencing. In *Arizona v. Holbert*, 114 Ariz. 244, 560 P.2d 428 (1977), the defendant pled guilty to second degree armed burglary and armed robbery and was sentenced to concurrent terms of not less than forty nor more than sixty years on both counts. The defendant's use of a gun during the commission of the offense rendered him ineligible for parole until serving the minimum term. None of the attorneys present nor the sentencing judge properly explained the consequences of the statute controlling parole eligibility to the defendant. The Court, while inquiring about the defendant's understanding of the plea, stated that the defendant was not eligible for parole until the expiration of five calendar years, a gross misstatement of his parole eligibility. Neither the defense attorney nor the prosecutor corrected the judge. The Arizona court found that the plea was, therefore, not knowingly and intelligently made and that the defendant did not understand the true consequences of his plea. In

Washington v. Harvey, 5 Wash. App. 719, 491 P.2d 660 (1971), the lower court had erroneously advised the defendant that the Board of Prison Terms and Paroles could determine what minimum term might be set where the consecutive terms imposed by the court created a mandatory minimum term. The court's erroneous advice rendered the plea defective.

Similarly, the prosecuting attorney's erroneous advice to a defendant concerning potential parole eligibility has been held to render a plea involuntary. In *Allen v. Cranor*, 45 Wash. 2d 25, 272 P.2d 153 (1954), a prosecuting attorney told the defendant that the parole board could set a minimum term of imprisonment when the law had been amended to deprive the board of that authority. Based on the erroneous advice given by the prosecutor, the guilty plea was set aside and habeas relief was granted.

Mr. Hill also raised in his petition the contention that he was denied effective assistance of counsel as guaranteed by the Sixth Amendment by his appointed attorney's failure to advise him correctly as to his potential parole eligibility date. The test for effective assistance of counsel is found in *Strickland v. Washington*, 104 S.Ct. 2052, 2064 (1984). In the instant case the United States Court of Appeals for the Eighth Circuit found that "counsel's advice concerning Hill's parole eligibility, even if not wholly accurate, does not amount to constitutionally inadequate performance and is not a dereliction of duty sufficient, by itself, to allow Hill to withdraw his guilty plea." (Appendix B hereto at p. B-8).

While the United States Court of Appeals for the Eighth Circuit is correct in asserting that counsel is not required to perform perfectly, *Strickland, supra*, at 2065, indicates that "[C]ounsel . . . has a duty to bear such skill and knowledge as will render the trial a reliable adversarial testing process." The attorneys' affidavits filed with the

United States District Court confirming the importance of properly advising clients of their parole eligibility dates should create a factual issue as to whether the adversarial nature of Mr. Hill's trial court appearance was reduced because of gross misinformation provided by his attorney. That misinformation could have been cured by the mere reading of a statute.

After showing that counsel's performance is deficient, *Strickland, supra*, at 1064, requires a review of whether counsel's errors were so serious as to deprive the defendant of a fair trial. [i.e. "(the errors of counsel) actually had an adverse effect on the defense." *Strickland, supra*, at 2067.] The adverse effect in Mr. Hill's case is obvious in that counsel's alleged errors resulted in a plea and waiver of a trial. At least a factual issue should exist as to whether or not Mr. Hill's appointed attorney acted within the range of competence demanded of attorneys in criminal cases, and to whether any failure to act competently prejudiced the outcome of Mr. Hill's proceeding. The reasonableness of Mr. Hill's attorney's conduct and likelihood of prejudice is best established at a hearing.

SUMMARY

For the reasons set forth in the argument, this case is one of imperative public importance involving a question of constitutional law which has not been but should be settled by this court, and therefore, the petitioner's request for writ of certiorari should be granted.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT
PINE BLUFF DIVISION
(Filed Feb. 28, 1983)

March 2, 1983
Attorney General
of Arkansas

WILLIAM LLOYD HILL PETITIONER

VS. CASE NO. PB-C-81-217

A.L. LOCKHART, Director, Arkansas
Department of Correction RESPONDENT

MEMORANDUM AND ORDER

The Court has received a petition for a writ of habeas corpus from William Lloyd Hill, an inmate of the Wrightsville Unit of the Arkansas Department of Correction. Petitioner pleaded guilty on April 16, 1979, in Pulaski County Circuit Court to the charges of first degree murder and theft of property. He is currently serving concurrent sentences of thirty-five years and ten years respectively.

In the present petition, petitioner contends his incarceration is unconstitutional for the following reasons:

1. His guilty plea was involuntary in that the sentence imposed was in violation of a negotiated plea bargain;

2. His counsel was ineffective in that he did not accurately advise him of his parole eligibility; and

3. He was denied due process during his appeal of the court's denial of his motion to withdraw his plea.

Petitioner filed a post-conviction motion under Rule 37 of the Arkansas Rules of Criminal Procedure, raising ground one, but the motion was denied on October 21, 1980 (Respondent's Exhibit to his Response, Exhibit B). Petitioner subsequently filed a motion to withdraw his plea pursuant to Rule 26.1 of the Arkansas Rules of Criminal Procedure, but his motion was found to be untimely filed and without merit. (Respondent's Exhibit to his Response, Exhibits C and D). Respondent concedes that petitioner has exhausted his state remedies.

I.

Petitioner contends that he agreed to plead guilty with the understanding that his sentence would be thirty-five years for first degree murder and ten years for theft of property, to be served concurrently and that he would only have to serve one-third of that sentence, less good time, to be eligible for parole. He further contends that under the provisions of *Ark. Stat. Ann.* § 43-2828, *et seq.*, he must serve one-half of his sentence before he is eligible for parole and that this renders his guilty plea involuntary. Petitioner requests that his plea "be vacated as void, or have corrective measures applied whereby the sentence both conforms to Arkansas law and approximates the conditions petitioner originally was led to believe existed—eligibility for parole consideration after having served six (6) years." (Tr. 54, Traverse and Reply to Respondent's Response to Petition for Writ of Habeas Corpus.)

At least part of petitioner's argument is misplaced. His actual sentence complied with the terms of the plea agreement. At the plea hearing the prosecutor stated, "Your Honor, the State has agreed upon a plea of guilty to recommend that Mr. Hill receive a total sentence of 35 years in the Arkansas State Penitentiary, . . . and then the other one will be ten years and that will be concurrent with it for a total of 35." (Trial Tr. p. 1). Petitioner affirmed to the Court that this was the plea agreement. (Trial Tr. pp. 1 and 4). The

Court entered a judgment of guilty and sentenced petitioner to the agreed upon term,[1] and then stated that petitioner would be required to serve at least one-third of his time before being eligible for parole. (Trial Tr. p. 5). There is no factual basis for petitioner's argument that the prosecutor did not fulfill his part of the bargain or that the Court did not impose the bargained for sentence. Petitioner's parole eligibility was not part of that bargain.

Petitioner is in reality arguing that his plea of guilty was involuntary because he was not aware of Arkansas' parole eligibility law which would require that he serve one-half of his sentence instead of only one-third. In other words, he was not fully aware of all of the consequences of his plea.

Because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts. *Johnson v. Zerbst*, 304 U.S. 458, 466 (1938). When a defendant enters a plea of guilty, he effectively waives several constitutional rights, including the privilege against self-incrimination, the right to trial by jury and the right to confront one's accusers. *Boykin v. Alabama*, 395 U.S. 238, 243 (1969); *Johnson v. Zerbst*, supra at 464. For this waiver to be valid under the Due Process Clause, it must be an intentional relinquishment or abandonment of a known right or privilege. *Johnson v. Zerbst*, supra. Although a guilty plea must be intelligently made to be valid, it does not follow that such a plea is vulnerable to collateral attack solely because the petitioner did not correctly assess every factor which con-

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[1]The transcript indicates that the judge stated "two years for theft of property" but this Court views this either as a misstatement or typographical error. It is obvious that the Judge meant to impose the bargained for sentence and the docket sheet (Petitioner's Exhibit A, Tr. 50) clearly indicates that the sentence was ten years for theft of property. In any event, this would not alter this Court's finding because the issue is not raised here.

tributed to his decision. *Brady v. United States*, 397 U.S. 742 (1970); *Thundershield v. Solem*, 565 F.2d 1018 (8th Cir. 1977), *cert. denied*, 435 U.S. 954 (1978).

> To withstand a constitutional challenge a guilty plea must represent 'a voluntary and intelligent choice among the alternative courses of action open to the defendant.' Thus, a state court may not accept a guilty plea unless the defendant enters it voluntarily and with sufficient understanding of the charge and the likely consequences of his plea. Although states must adhere to this standard, there is no constitutional requirement that the trial court employ a particular litany to validate a guilty plea. Instead, when a prisoner alleges that a guilty plea proceeding in state court was constitutionally defective because he was not specifically informed of one of the consequences of his plea, that is, the possible sentence, the issue is whether he was aware of the actual sentencing possibilities and, if not, whether accurate information would have made any difference in his decision to plead guilty.

Rouse v. Foster, 672 F.2d 649, 651 (8th Cir. 1982) (citations and footnote omitted).

Petitioner was questioned extensively at the plea hearing. The transcript of that hearing reveals the following:

> THE COURT: Are you William Lloyd Hill?
>
> DEFENDANT HILL: Yes, sir.
>
> THE COURT: And you want to plead guilty to this charge with this sentence in mind?
>
> DEFENDANT HILL: Yes, sir.
>
> THE COURT: Are you guilty?
>
> DEFENDANT HILL: Yes, sir.
>
> ....

> THE COURT: All right. Is this your signature on the bottom of this plea statement?
>
> DEFENDANT HILL: Yes, sir.
>
> THE COURT: Has your attorney explained this statement to you?
>
> DEFENDANT HILL: Yes, sir.
>
> THE COURT: Do you understand it?
>
> DEFENDANT HILL: Yes, sir.
>
> THE COURT: Do you have any questions about it?
>
> DEFENDANT HILL: No, sir.
>
> THE COURT: Any threats or promises made to get you to enter the plea of guilty?
>
> DEFENDANT HILL: No, sir.
>
> THE COURT: Other than the negotiated plea?
>
> DEFENDANT HILL: No, sir.
>
> ....
>
> THE COURT: Well, all thing considered, of course, you understand that you are entitled to trial by jury on this case and have them determine your guilt or innocence, as well as fix the punishment in this case. Do you understand that?
>
> DEFENDANT HILL: Yes, sir. I understand that.
>
> THE COURT: You are entitled to call witnesses in your own behalf and cross examine witnesses called by the state. Are you aware of that?
>
> DEFENDANT HILL: Yes, sir; I am.

THE COURT: All things considered, it is your decision advising with your attorney to enter a plea of guilty on the negotiated plea of 35 years for murder and 10 years for theft of property?

DEFENDANT HILL: Yes, sir.

In *Pennington v. Housewright*, 666 F.2d 329 (8th Cir. 1981), the Eighth Circuit examined the Arkansas procedures for acceptance of guilty pleas and found that they were sufficient to show that Pennington's plea was voluntary. The Court noted that under *Blackledge v. Allison*, 431 U.S. 63 (1977), the Arkansas procedures would require a district court to grant a habeas petitioner a hearing " 'only in the most extraordinary circumstances.' A transcript of the plea hearing is in the record. The prosecutor told the court the plea was negotiated. The defendant said he understood the negotiated plea to be that which the prosecutor described. Thus the secrecy which surrounded Allison's plea bargain was absent in the instant case." 666 F.2d at 331-2.

In noting that a guilty plea received under Arkansas' procedures is not immune from attack through habeas corpus, the Court observed that "The voluntariness of a plea could be established more conclusively if, for example, the legitimacy of plea bargaining were expressly stated, the defendant were the first person asked to describe the terms of the plea bargain, and the defendant were informed of his eligibility for parole" 666 F.2d at 332, n. 5. The Court cited *Durant v. United States*, 410 F.2d 689 (1st Cir. 1969), in which it was held that "ineligibility for parole is a consequence of a plea of guilty and under Rule 11 the district court should not have accepted the guilty plea without first informing the defendant that conviction upon the plea would make him ineligible for parole" 410 F.2d at 693. The *Pennington* Court further noted, however, that under Fed.R.Crim.P. 11(c)(2) (Advis. Comm. Notes 1974 Amend.), the disclosure of such information is optional.

Petitioner's parole eligibility date is governed by Act 93 of 1977 (Ark. Stat. Ann. §§ 43-2828-29). There is no constitutional or inherent right of a convicted person to be released on parole prior to the expiration of a valid sentence, and a convicted person is not entitled to parole unless the state's statutory provisions governing parole release expressly create such an entitlement. *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979). Under Arkansas' statutory scheme, only the possibility of parole is established. *Robinson v. Mabry*, 476 F. Supp. 1022 (E.D. Ark. 1979). The mere possibility of parole provides nothing more than a hope that the benefit will be obtained. *Greenholtz, supra*, at 11.

It appears that the Eighth Circuit has not directly ruled on the question of whether parole eligibility is such a consequence of a guilty plea that the state court's failure to adequately advise a defendant of such would entitle him to habeas relief. It is clear that under Rule 11 of the Fed.R.Crim. P. such advice is optional. While *Pennington* indicates that such advice is desired, it does not require it.

In *Hunter v. Fogg*, 616 F.2d 55 (2d Cir. 1980), the petitioner contended that he had been misled by the court, the prosecutor and his attorney concerning the length of possible minimum sentence because he had been misinformed about his parole eligibility date. Petitioner's attorney filed an affidavit, stating that he had told petitioner that one year would be his earliest possible eligibility date, that petitioner's plea included an understanding that he would not be sentenced as a "predicate felon," and that he believed that petitioner would not have pleaded guilty had he known that he would be eligible for parole only after serving five years of his sentence. The district court granted the petition, but the Second Circuit reversed, finding that "the constitutional requirements of a state court guilty plea include informing a defendant of a mandatory minimum sentence (the lowest possible maximum), but do not include informing him of the minimum portion of his sentence a court may require him to serve." 616 F.2d at 61.

> Having concluded that the constitutional requirements of a state court guilty plea do not include informing a defendant of the minimum portion of a sentence that a court may require him to serve, we see even less need to require that a defendant be informed of the minimum period of imprisonment that might be set by a parole board. The setting of MPI is more analogous to a parole release decision than to a minimum judicial sentence.

Supra, at 61-62.[2]

> The consequences which must be understood are only those which flow from the plea. Potential parole eligibility, absent special limitations, is not a direct incident to a guilty plea, and need not be previously communicated to a defendant . . . .
>
> Many aspects of traditional parole need not be communicated to the defendant by the trial judge under the umbrella of Rule 11. For example, a defendant need not be advised of all conceivable consequences such as when he may be considered for parole or that, if he violates his parole, he will again be imprisoned . . . .
>
> If the parole ineligibility were for defendant's entire term, then, any guilty plea would have to reflect that understanding . . . .

Bell v. State of North Carolina, 576 F.2d 564, 565-566 (4th Cir.) *cert. denied* 439 U.S. 956 (1978).

This Court concludes that even if petitioner was misled by predictions of counsel or by the statement of the sentencing judge that he would have to serve at least one-third of his sentence before being eligible for parole, his parole eligibility is not such a consequence of his guilty plea that such misinformation renders his plea involuntary.

---

[2]This Court notes here that although the trial court did not inform the present petitioner of the minimum and maximum sentence possible, petitioner suffered no prejudice because the Court honored the plea bargain.

II.

Petitioner's second contention is that his counsel was ineffective in that he did not adequately advise him of his parole eligibility. Petitioner specifically contends that his attorney did not inform him of the existence of Act 93 or its applicability to him or that the court could impose a different sentence than the one for which he had bargained and that his attorney told him that he would only have to serve six years of his sentence if he stayed out of trouble. The Court determined above that petitioner received the benefit of his bargain and, therefore, is entitled to no relief with regard to this specific allegation.

> A guilty plea is open to attack on the ground that counsel did not provide the defendant with 'reasonably competent advice . . . .' We have repeatedly held that counsel fails to render the constitutionally required effective assistance when he does not exercise the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances . . . . In order to prevail on an ineffective assistance of counsel theory, a habeas petitioner must establish that: (1) his attorney failed to exercise the customary skill and diligence that a reasonably competent attorney would have performed under the same set of circumstances; and (2) that his lawyer's ineffectiveness prejudiced him . . . .

Hawkman v. Parratt, 661 F.2d 1161, 1165 (8th Cir. 1981). (Citations omitted).

> 'When a defendant pleads guilty on the advice of counsel, the attorney has the duty to advise the defendant of the available options and possible consequences.' A guilty plea must represent the informed, self-determined choice of the defendant among practicable alternatives; a guilty plea cannot be a conscious, informed choice if the accused relies upon counsel who performs ineffectively in advising him regarding the consequences of entering a guilty plea and of the feasible op-

> tions. To prove that counsel was ineffective, the habeas petitioner must demonstrate that the advice was not within the range of competence demanded of attorneys in criminal cases.

Supra at 1170. (Citations and footnotes omitted).

> In the guilty plea context, a lawyer need not give wholly accurate advice in order to render effective assistance; he need not correctly predict the admissibility of evidence or anticipate future judicial holdings. His advice, however, must be 'within the range of competence demanded of attorneys in criminal cases.'

Supra, n. 18.

This Court finds that the fact that petitioner's attorney may have advised him incorrectly as to his parole eligibility date does not render counsel's performance constitutionally inadequate. As stated above, aspects of traditional parole eligibility need not be communicated to a defendant. It follows then that even if an attorney's advice concerning such eligibility is not wholly accurate, such advice does not render that attorney's performance constitutionally inadequate. Petitioner is not entitled to relief on this ground.

III.

Petitioner's third ground for relief is that he was denied due process during his appeal of the court's denial of his motion to withdraw his plea. He contends that he was not allowed sufficient time to file a "traverse" to the prosecutor's response to his motion to withdraw his plea. The exhibits filed with respondent's answer to petitioner's petition before this Court include certified copies of the Order and Judgment denying petitioner's motion. (Respondent's Exhibits C and D). Exhibit C is an Order dated March 17, 1981, in which the court denied petitioner's motion as being untimely filed. Exhibit D is a Judgment entered nunc pro tunc to March 17. This Court finds that such an allegation

fails to state a ground upon which habeas relief could be granted.

On September 20, 1982, petitioner filed a motion for a temporary restraining order, stating that he had been transferred from the Cummins Unit of the Arkansas Department of Correction to the Wrightsville Unit and that the law library at Wrightsville and his access to it was inadequate for him to prepare legal documents relating to his petition. This Court ordered that the respondent be served with a copy of the motion and that he respond. His response reflects that petitioner has now been transferred back to Cummins. It appears that the motion is now moot.

Although the merits of the petitioner's claim have been thoroughly addressed, the Court is compelled to comment briefly on the policy considerations at stake here, for this case exemplifies the pitfalls of the plea bargaining system.

Here, the federal court is at the mercy of the plea bargainer who claims that not only the sentencing court, but his own counsel, failed to inform him of the possible consequences of his plea with respect to parole. Yet in this case, like many others, there is no evidence of intentional misrepresentation by either the state or the petitioner's counsel concerning the plea bargain. Neither is there any evidence that the court misinformed the petitioner with respect to the bargain. The court was entirely correct in stating, *after accepting the plea of guilty*, that the defendant would have to serve *at least* one-third of his sentence before becoming eligible for parole. Strictly speaking, that would entail a term of approximately 12 years (one third of 35 years). If the one-third rule applied to the petitioner, and he accrued maximum good time (one month for each month served), he could have been eligible for parole in six years. As it now stands, the one-half rule applies and, coupled with maximum good time, he could be eligible for parole in nine years. Nine years is actually *less* than one third of the actual

sentence imposed, yet the Court would be appalled if the state contended that, because the judge stated that the petitioner had to serve *at least* one-third of his sentence, the petitioner had to actually serve 12 years. The petitioner wants the bargain to cut but one way, his way, and thus one of the many flaws in the plea bargaining system is exposed.

Notwithstanding this Court's numerical speculations, the "bargain" of the plea bargain is for the sentence *imposed*, not for the time actually to be served. Neither the court, the state, nor the petitioner's attorney can possibly know the minimum time the defendant must serve before becoming eligible for parole. The petitioner's own behavior is the primary determinant of his parole eligibility date. Likewise legislative or administrative changes in the parole eligibility rules made subsequent to the petitioner's sentencing could affect the date. If that should occur could the prisoner come back and claim that the sentencing judge lied to him, or that his attorney was incompetent because he or she did not forewarn the petitioner that such events might occur?

The simple fact is, if the federal courts are to enforce plea bargaining agreements, they should be enforced with this understanding: the defendant must serve no longer a term for the offense to which he pleaded than that to which the judge sentenced him. That is the agreement. Neither the court, the state nor the defendant's attorney can determine when and if he will be eligible for parole. And statements made by those parties concerning parole eligiblity, unless they are made falsely or misinform with respect to the maximum sentence that is *actually imposed*, should not be considered as determinative of whether the guilty plea was made voluntarily or whether the defendant received the benefit of his bargain. To allow otherwise would be to establish a basis for reopening every plea bargaining arrangement any time a defendant did not become eligible for parole at the time estimated by the attorneys or the court.

It is therefore Ordered that this petition be, and it is hereby, denied.

It is further Ordered that petitioner's motion for a temporary prestraining order be, and it is hereby, denied.

It is so Ordered this 28th day of February, 1983.

/s/ Garrett Thomas Eisele
United States District Judge

APPENDIX B

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 83-1397

William Lloyd Hill,	*
	*
Appellant,	*
	* Appeal from the United
v.	* States District Court for
	* the Eastern District of
A.L. Lockhart, Director	* Arkansas
Arkansas Department of	*
Correction,	*
	*
Appellee.	*

Submitted: September 15, 1983

Filed: April 9, 1984

Before HEANEY, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and JOHN R. GIBSON, Circuit Judge.

JOHN R. GIBSON, Circuit Judge.

William Lloyd Hill appeals the denial of his petition for writ of habeas corpus under 28 U.S.C. § 2254 (1977). Hill pleaded guilty to a charge of first degree murder and theft of property in the Circuit Court of Pulaski County, Arkansas, and was sentenced to thirty-five years imprisonment for the murder and a ten-year concurrent sentence for the theft. Hill claims that he

entered the guilty plea with the understanding that he would have to serve only one-third of his sentence, less good time, before becoming eligible for parole. Because he is a second offender, he is not eligible for parole until he has served one-half of his term less good time. We affirm the order of the district court.[1]

The district court refused an evidentiary hearing and based its ruling on the record before it. The district court set out in some detail the questioning at the plea hearing:

> THE COURT: And you want to plead guilty to this charge with this sentence in mind?
> DEFENDANT HILL: Yes, sir.
>
> THE COURT: Are you guilty?
>
> DEFENDANT HILL: Yes, sir.
>
> . . . .
>
> THE COURT: All right. Is this your signature on the bottom of this plea statement?
>
> DEFENDANT HILL: Yes, sir.
>
> THE COURT: Has your attorney explained this statement to you?
>
> DEFENDANT HILL: Yes, sir.
>
> THE COURT: Do you understand it?
>
> DEFENDANT HILL: Yes, sir.
>
> THE COURT: Do you have any questions about it?

[1]The Honorable G. Thomas Eisele, United States District Judge for the Eastern District of Arkansas.

> DEFENDANT HILL: No, sir.
>
> THE COURT: Any threats or promises made to get you to enter the plea of guilty?
>
> DEFENDANT HILL: No, sir.
>
> THE COURT: Other than the negotiated plea?
>
> DEFENDANT HILL: No, sir.

The district court concluded that Hill's parole eligibility was not of such consequence that his guilty plea was rendered involuntary and that the incorrect advice as to parole eligibility did not render counsel's performance constitutionally inadequate. The court found no constitutional violation in denying Hill's motion to withdraw his plea. The district court observed that the state trial court had been correct in informing Hill that he would have to serve at least one-third of his sentence before becoming eligible for parole, and pointed out that with maximum good time and application of the one-half rather than the one-third rule Hill could become eligible for parole in nine years. This is less than one-third of the sentence imposed and it was this sentence, rather than the time actually to be served that was the bargain involved with respect to the plea.

Act 93, Ark. Stat. Ann. §§ 43-2828(2) and 43-2829(3) (1977), mandates that a second offender serve one-half of his term less good time. Failure to be advised of this statute is the issue in this case. As the district court properly observed, whether the incorrect advice as to parole eligibility would entitle Hill to habeas relief is a question of first impression in this circuit.

Hill in his petition attached affidavits of two attorneys which discussed the importance of the possible parole date in plea negotiations. Hill contended in his petition that the advice given him by counsel was that he would be eligible for parole after serving one third of his sentence, less good

time, which would be approximately six years. The attorney failed to inform him of Act 93 requiring that as a second offender he serve one-half of his term, less good time, which would be approximately nine years.

Hill's contention on this appeal is that he is entitled to an evidentiary hearing on whether his plea was voluntary in view of the incorrect advice given him by his lawyer.

I.

The details of parole eligibility are considered collateral rather than direct consequences of a plea, of which a defendant need not be informed before pleading guilty. *Cepulonis v. Ponte*, 699 F.2d 573 (1st Cir. 1983); *Hunter v. Fogg*, 616 F.2d 55 (2d Cir. 1980); *Trujillo v. United States*, 377 F.2d 266 (5th Cir.), *cert. denied*, 389 U.S. 899 (1967).

Neither the Federal[2] nor Arkansas[3] Rules of Criminal Procedure require that information about parole eligibility be explained to a defendant. We should not, by judicial opinion, require state procedures to provide state defendants with information that our rules do not require be given to federal defendants. As the Second Circuit explained in reference to Rule 11, as a matter of federal constitutional law, a higher standard should not be applied to a state judge than is applied to a federal district judge performing the same function. *Hunter, supra*, 616 F.2d at 61.

---

[2]Fed. R. Crim. P. 11(c)(1). As expxlained in the notes to Rule 11 of the Federal Rules of Criminal Procedure (Advis. Comm. Notes 1974 Amend.), under the 1974 amendment to Rule 11 it is not required that the defendant be informed of parole eligibility. In *Moody v. United States*, 469 F.2d 705 (8th Cir. 1972), this Court held that ineligibility for parole was a direct consequence of a guilty plea. However, that decision was prior to the 1974 amendment to rule 11, and as this Court noted in *Pennington v. Housewright*, 666 F.2d 329, 332 n.5 (8th Cir. 1981), *cert. denied*, 456 U.S. 918 (1982), the rule no longer requires that a defendant be advised about parole eligibility. *Cf. United States v. DeGand*, 614 F.2d 176 (8th Cir. 1980).

[3]*Rightmire v. State*, 627 S.W.2d 10 (Ark. 1982).

II.

We believe the district court properly relied on *Hunter v. Fogg, supra*. In *Hunter* the petitioner claimed that he had been misled by the court, the prosecutor and his attorney concerning his possible minimum sentence because he had been misinformed about his parole eligibility date. The *Hunter* court reasoned that the minimum period of imprisonment is more analogous to a parole release decision than a minimum judicial sentence; therefore the constitutional requirements of a state court guilty plea include informing a defendant of a mandatory minimum sentence, but do not include informing him of his parole eligibility date. The *Hunter* court refused to vacate the petitioner's conviction, holding that "[t]he voluntariness of a guilty plea is not undermined by lack of explanation as to the mechanics of a parole system . . . ." 616 F.2d at 62.

The Fourth Circuit in *Strader v. Garrison*, 611 F.2d 61 (4th Cir. 1979), reached a contrary conclusion. In *Strader* the court held that when the misadvice of a lawyer is so gross as to amount to a denial of the constitutional right to the effective assistance of counsel, the defendant must be allowed to withdraw his plea of guilty.

This is not a case involving intentional misrepresentation. The district court was correct in informing Hill that he would have to serve at least one-third of his sentence before becoming eligible for parole. Even under the one-half rule of Act 93, with maximum good time, Hill could be eligible for parole in nine years. This is less than one-third of the actual sentence imposed. The district court properly concluded that the plea bargain is for the judicial sentence imposed, not the actual time to be served. As is evident from the transcript of the plea proceedings, Hill's parole eligibility date was not a part of the plea bargain. The agreement, by which the state is bound and to which Hill is entitled, is simply that he will serve no longer a term than that to which the judge sentenced him.

The plea hearing also did not concern itself in any respect with allowance for good time. After the court had pronounced sentence and allowed petitioner credit for the four months served, he asked, "Do you have any questions about the plea or sentence or anything having to do with this case," and Hill's answer was, "No." Hill's lawyer at the plea hearing is now deceased. There is nothing to indicate that at the time the plea was entered the good-time allowance or parole eligibility were considerations in the decision to enter a guilty plea.

Even in *Strader*, the court stated that a defendant's plea is not rendered involuntary in a constitutional sense if he is not informed of all the possible indirect and collateral consequences of his plea; and the *Strader* court recognized that ordinarily parole eligibility is such an indirect and collateral consequence that the defendant need not be specifically advised by the court or counsel before accepting a guilty plea. 611 F.2d at 63.

Strader involved gross misinformation. While Strader's lawyer advised him that his thirty-year concurrent sentence would have no effect on his parole eligibility date, the published regulations of the Department of Corrections were to the contrary. This meant that his parole eligibility date was extended by one-fourth of the thirty years to eight and three-fourths years instead of the anticipated one and one-fourth years. *Strader*, 611 F.2d at 63. Such gross misinformation is not a factor in this case. The nine-year parole eligibility date under even the one-half rule does not demonstrate that Hill was grossly misinformed.[4]

[4]In another Fourth Circuit case which followed *Strader*, *supra*, gross misinformation was involved. *O'Tuel v. Osborne*, 706 F.2d 498 (4th Cir. 1983). In *O'Tuel* the defendant had been told that he would be eligible for parole in ten years when in fact he would not be eligible for parole until after he had served 20 years. 706 F.2d at 499. *Strader* and *O'Tuel* do not define "gross misinformation," but as is evident involve major miscalculations in the years. It is this miscalculation in years that is material to the individual in question rather than the reason for the miscalculation.

Although this Court has not directly ruled on the question of whether misinformation regarding parole eligibility vitiates a guilty plea, we considered an analogous situation in *United States v. DeGand*, *supra*, 614 F.2d 176. In *DeGand*, the defendant contended that his attorney misled him to believe that his sentences would run concurrently. This Court stated that "the erroneous advice of counsel as to the penalty which may be imposed does not, by itself, lead to manifest injustice sufficient to allow a defendant to withdraw his guilty plea. *Id.* at 178. In a footnote we explained that this is particularly true where the penalties are collateral rather than direct consequences of the plea. *Id.* at 178 n.4.

This case is similar to *DeGand*. Parole eligibility is not a direct consequence of a guilty plea and the alleged misinformation Hill received regarding his parole eligibility is not sufficient to render his guilty plea involuntary.

Further reasons articulated by the district court make it undesirable that claimed misadvice on parole eligibility render the plea involuntary. The petitioner's behavior and legislative and administrative changes in parole eligibility rules may effect this date. Every plea bargaining arrangement thus would be subject to reopening any time a defendant did not become eligible for parole at the time estimated. We do not believe that the constitution requires this conclusion.

III.

Hill also contends that he is entitled to habeas relief on the ground that his counsel's erroneous advice amounted to ineffective assistance of counsel in violation of the sixth amendment. To prevail on an ineffective assistance of counsel theory, a habeas petitioner must establish: (1) that his attorney failed to exercise the customary skill and diligence that a reasonably competent attorney would exercise under similar circumstances; and (2) that he was pre-

judiced by his attorney's ineffectiveness. *Brunson v. Higgins*, 708 F.2d 1353, 1356 (8th Cir. 1983). Counsel is presumed to have rendered effective assistance. *Harris v. Housewright*, 697 F.2d 202, 206 (8th Cir. 1982).

In challenging the effectiveness of counsel, Hill must allege and prove a serious dereliction of duty on the part of counsel sufficient to show that his plea was not a voluntary and intelligent act. *McMann v. Richardson*, 397 U.S. 759, 774 (1970); *Zaehringer v. Brewer*, 635 F.2d 734, 737 (8th Cir. 1980), *cert. denied*, 454 U.S. 1100 (1981). Counsel is not required to perform perfectly. *Brunson, supra*, 708 F.2d at 1356. In the guilty plea context, a lawyer need not give wholly accurate advice in order to render effective assistance. *Hawkman v. Parratt*, 661 F.2d 1161, 1170 n. 18 (8th Cir. 1981).

In *Strader* the Fourth Circuit held that "when a defendant is grossly misinformed about his parole eligibility, and relies upon that misinformation, he is deprived of his constitutional right to counsel. 611 F.2d at 65. As previously stated, however, gross misinformation is not involved in this case. Counsel's advice concerning Hill's parole eligibility, even if not wholly accurate, does not amount to constitutionally inadequate performance and is not a dereliction of duty sufficient, by itself, to allow Hill to withdraw his guilty plea.

IV.

Since it conclusively appears from the record in this case that Hill is entitled to no relief, the district court did not err in denying Hill's petition without an evidentiary hearing.

A hearing is not required where the issues can be resolved on the basis of the record. *Lindner v. Wyrick*, 644 F.2d 724 (8th Cir.), *cert. denied*, 454 U.S. 872 (1981). This Court has found that the Arkansas guilty plea procedures

would require a hearing only in the most extraordinary circumstances. *Pennington v. Housewright, supra*, 666 F.2d at 331. *See also Blackledge v. Allison*, 431 U.S. 63, 80 n.19 (1977).

A transcript of the plea hearing is in the record, and from this transcript it is evident that Hill understood the plea bargain and his rights thereunder. Hill asserts, however, that if granted an evidentiary hearing he could establish that his counsel provided him with erroneous advice. In light of our conclusion that counsel's erroneous advice is not sufficient, by itself, to allow Hill to withdraw his guilty plea, even if Hill could establish the truth of his allegation, such would not mandate a different result. No hearing is required where a hearing could have no impact on the result. *Lindner, supra*, 644 F.2d at 729. Since Hill does not indicate any additional information material to his petition that could be adduced at a hearing, the district court's failure to hold an evidentiary hearing was not improper.

For all the reasons stated above, we affirm the order of the district court.

HEANEY, Circuit Judge, dissenting.

I respectfully dissent. Hill alleges his attorney told him before he agreed to plead guilty that he would be eligible for parole after serving one-third of his sentence less good time, or approximately six years. In fact, Arkansas law requires Hill, as a second offender, to serve at least one-half of his sentence less good time, or nine years. The Fourth Circuit regards as incompetent an attorney who wrongly informs a client contemplating a plea bargain that the client will spend less time incarcerated than the published law mandates. *O'Tuel v. Osborne*, 706 F.2d 498, 500 (4th Cir. 1983); *Strader v. Garrison*, 611 F.2d 61, 63 (4th Cir. 1979). I agree, and would remand Hill's cause to the district court for an evidentiary hearing.

A defendant who pleads guilty has no less of a right to effective assistance of counsel than the defendant who goes to trial. "When a defendant pleads guilty on the advice of counsel, the attorney has the duty to advise the defendant of the available options and possible consequences." *Beckman v. Wainwright*, 639 F.2d 262, 267 (5th Cir. 1981) (citing *Brady v. United States*, 397 U.S. 742, 756 (1970)). "A guilty plea must represent the informed, self-determined choice of the defendant among practicable alternatives; a guilty plea cannot be a conscious, informed choice if the accused relies upon counsel who performs ineffectively in advising him regarding the consequences of entering a guilty plea and of the feasible options." *Hawkman v. Parratt*, 661 F.2d 1161, 1170 (8th Cir. 1981) (citations omitted).

What singles this case out from the myriad of habeas cases in which defendants claim their attorneys misled them into pleading guilty is the allegation that Hill's attorney misinformed him on the applicable law. In *Strader*, the defendant's lawyer assured his client that by pleading guilty and accepting a thirty-year sentence to run concurrently with a prior sentence, the defendant would not extend his prior parole eligibility date. This advice ran contrary to a published regulation of the state department of corrections which required recomputation of parole eligibility upon imposition of an additional concurrent sentence. In holding that the attorney's misinformation constituted ineffective assistance of counsel, the Court stated:

> This was not just a prediction that was not realized. The lawyer could have discovered the applicable rule had he looked in the published material, but he did not. The result was that Strader entered his guilty plea believing that his new eligibility date would be several years sooner than the regulations permitted.

Strader v. Garrison, supra, 611 F.2d at 63.

Similarly, in *O'Tuel v. Osborne, supra*, 706 F.2d at 499, the Court found an attorney ineffective when he failed to

discover the applicable statute had been amended and consequently informed his client that he would be eligible for parole after ten years instead of the actual twenty.

The failure to properly instruct one's client on the consequences of published law also distinguishes Hill's case from *United States v. Degand*, 614 F.2d 176 (8th Cir. 1980), relied on by the majority. Degand claimed his counsel misled him to believe that his state and federal sentences would run concurrently. At sentencing, Degand's attorney expressed his "hope that your action, Your Honor, would make it possible that we might combine time-wise the * * * imprisonment in Illinois and the federal punishment at the hands of the Federal Government in this case." *Id.* at 178. Any advice Degand's attorney gave him was based on hope of leniency rather than a misreading of the law. This distinction is important because Degand waived any reliance on his attorney's assurances of leniency when he acknowledged at the plea hearing that sentencing was in the sole discretion of the trial judge. Nothing said at Hill's plea hearing would have alerted him to his attorney's legal error. The court did not address parole eligibility until after accepting the plea. Even then, the court reinforced the attorney's error by stating Hill would have to serve "at least one-third of his sentence."

The majority distinguishes the Fourth Circuit precedents by asserting they involved "gross misconduct" by the attorneys. The majority does not attempt to define gross misconduct or distinguish the alleged misconduct of Hill's attorney. The seriousness of the attorney's misconduct cannot be calculated by merely figuring the number of years in prison the attorney's mistake cost the defendant. In *Strader*, the Court did not state the exact number of years the overlooked regulation pushed back Strader's parole eligibility date, but noted it was "several." At any rate, we cannot measure an attorney's misconduct by the relative seriousness of the defendant's offense and the consequent length of sentence. Furthermore, the magnitude of the

alleged oversight in this case is no less than in the Fourth Circuit cases. In *Strader*, the attorney did not look up the department of corrections' regulations; in *O'Tuel*, the attorney did not check the statute for amendments; here, the attorney allegedly did not consult the statute applicable to second offenders. In each case, the attorney failed to do the minimal research necesary to ascertain the applicable law. The *Strader* Court was justified in labeling this failing "gross misconduct."

I agree with the majority that the state court did not need to inform Hill of his parole eligibility date to assure the voluntariness of his plea. The collateral consequences rule should not bar an ineffective assistance of counsel claim, however, where an attorney's misadvice respecting a collateral consequence induces a defendant to plead guilty. The district court dismissed Hill's ineffective assistance of counsel claim without a hearing because it did not believe the facts alleged raised a constitutional claim. I would remand to the district court to determine whether Hill's counsel wrongly advised him on his parole eligibility prior to his plea.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX C

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 83-1397

William Lloyd Hill,	*	
	*	
Appellant,	*	
	*	
v.	*	Appeal from the United
	*	States District Court for
A.L. Lockhart, Director,	*	the Eastern District
Arkansas Department of	*	of Arkansas.
Correction,	*	
	*	
Appellee.	*	

Submitted: September 10, 1984
Filed: September 20, 1984

Before LAY, Chief Judge, FLOYD R. GIBSON, Senior Circuit Judge, and HEANEY, BRIGHT, ROSS, McMILLIAN, ARNOLD, JOHN R. GIBSON, FAGG and BOWMAN, Circuit Judges, en banc.

ORDER

This case has been considered by the court en banc. The judgment of the district court is affirmed by an equally divided court.

Office-Supreme Court, U.S.
FILED
FEB 2 1985
ALEXANDER L. STEVAS,
CLERK

(2)

NO. 84-1103

IN THE SUPREME COURT OF THE
UNITED STATES
OCTOBER TERM, 1984

WILLIAM LLOYD HILL PETITIONER

VS.

A.L. LOCKHART, DIRECTOR
ARKANSAS DEPARTMENT OF
CORRECTION RESPONDENT

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION

STEVE CLARK
Attorney General

ALICE ANN BURNS
Deputy Attorney General
Justice Building
Little Rock, AR 72201
501/371-2007

ATTORNEYS FOR
RESPONDENT

QUESTION PRESENTED FOR REVIEW

WHETHER A STATE PRISONER IS ENTITLED TO AN EVIDENTIARY HEARING IN UNITED STATES DISTRICT COURT HABEAS CORPUS PROCEEDING WHERE THE PRISONER HAS PLEAD IN HIS PETITION THAT HIS STATE COURT NEGOTIATED GUILTY PLEA WAS INVOLUNTARY AND RESULTED FROM INEFFECTIVE REPRESENTATION OF COUNSEL IN THAT HIS ATTORNEY MISADVISED HIM AS TO HIS POTENTIAL PAROLE ELIGIBILITY DATE AND AS A RESULT OF THAT ADVICE THE PRISONER ACCEPTED THE PLEA OFFER AND ENTERED THE GUILTY PLEA?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (cont'd)

STATUTES AND RULES

MISCELLANEOUS

OPINION BELOW

The opinion of the Eighth Circuit Court of Appeals is reported, viz, Hill v. Lockhart, 731 F.2d 568 (8th Cir. 1984). A copy of the opinion is included in petitioner's appendix B, pp. 1-12. The district court opinion is included in petitioner's appendix A, pp. 1-13.

JURISDICTIONAL STATEMENT

Respondent agrees that this Court has discretionary jurisdiction to review this case.

CONSTITUTIONAL PROVISIONS AND STATUTES

The applicable constitutional provisions are set forth in Petitioner's Brief at p. 2.

Ark. Stat. Ann. §43-2828(2) (Repl. 1977) provides:

> 43-2828. Classification of inmates. -- For the purposes of this Act [§§43-2828 - 43-2833], inmates shall be classified as follows:
>
> (2) Second offenders shall be inmates convicted of two or more felonies and who have been once incarcerated in some correctional institution in the United States, whether local, state or federal, for a crime which was a felony under the laws of the jurisdiction in which the offender was incarcerated, prior to being sentenced to a correctional institution in this State for the offense or offenses for which they are being classified.

Ark. Stat. Ann. §43-2829 B.(3) (Repl. 1977) provides:

> 43-2829. Parole eligibility. --.
>
> B. Persons who commit felonies on and after April 1, 1977, and shall be convicted and incarcerated for the same, shall be eligible for release on parole as follows: * * *

(3) Inmates classified as second offenders under this Act upon entering a correctional institution in this State under sentence from a circuit court shall not be eligible for release on parole until a minimum of one-half (1/2) of their sentence shall have been served, with credit for good time allowances, or one-half (1/2) of the time to which sentence is commuted by executive clemency, with credit for good time allowances.

Arkansas Rules of Criminal Procedure 25.3, Ark. Stat. Ann. Vol. 4A (Repl. 1977) provides:

RULE 25.3 Responsibilities of the Trial Judge.

(a) The judge shall not participate in plea discussions.

(b) If a plea agreement has been reached which contemplates entry of a plea of guilty or nolo contendere in the expectation that the charge or charges will be reduced, that other charges will be dismissed, or that sentence concessions will be granted, upon request of the parties the trial judge may permit the disclosure to him of the agreement and the reasons therefor in advance of the time for tender of the plea.

He may then indicate whether he will concur in the proposed disposition. If, after the judge has indicated his concurrence with a plea agreement and the defendant has entered a plea of guilty or nolo contendere, but before sentencing, the judge decides that the disposition should not include the charge or sentence concessions contemplated by the agreement, he shall so advise the parties and then in open court call upon the defendant to either affirm or withdraw his plea.

(c) If the parties have not sought the concurrence of the trial judge in a plea agreement or if the judge has declined to indicate whether he will concur in the agreement, he shall advise the defendant in open court at the time the agreement is stated that:

(i) the agreement is not binding on the court; and

(ii) if the defendant pleads guilty or nolo contendere the disposition may be different from that contemplated by the agreement.

(d) A verbatim record of all proceedings had in open court pursuant to subsections (b) and (c) of this rule shall be made and preserved by the court.

STATEMENT OF THE CASE

Respondent concurs in petitioner's Statement of the Case.

ARGUMENT

Petitioner contends he was misinformed by defense counsel regarding parole eligibility laws and that, as a result of that erroneous advice, he accepted the plea offer of the State of Arkansas and entered guilty pleas to first degree murder and theft of property. Petitioner asserts that the decision to deny habeas corpus relief rendered by the Eighth Circuit Court of Appeals should be reviewed because it is in conflict with decisions of other courts, particularly the Fourth Circuit Court of Appeals.

Respondent believes that review should be denied because petitioner's plea of guilty was not induced by defense counsel's erroneous advice.

Thus, the decision by the Eighth Circuit Court of Appeals was correct and in line with case law from other jurisdictions.

Both the district court and the Eighth Circuit Court of Appeals determined that petitioner's parole eligibility was not part of the bargain when petitioner entered his plea of guilty, nor was it a consideration in petitioner's decision to plead guilty. A-3, B-5, B-6. The basis for this determination was the transcript of the hearing at which petitioner entered his pleas. A-2, A-3, B-6. As noted by the district court, petitioner affirmed to the State trial court at the hearing that the terms of the plea agreement with the State included terms of incarceration of 35 and 10 years respectively. The State court thereupon entered judgment and sentenced

petitioner accordingly. Petitioner was then advised by the court that he would be required to serve at least one-third of his time before being eligible for parole. A-2, 3. At some point prior to the hearing, defense counsel also informed petitioner he would be required to serve one-third of his time before becoming eligible for parole. B-3, 4.

Respondent thus does not dispute the fact that petitioner was misinformed, both by the court and defense counsel. Under the applicable Arkansas law, petitioner, as a second offender, is required to serve one-half of his term before becoming eligible for parole, and petitioner was not so advised. A-2, 7; B-1, 2, 3, 4. The Courts below properly denied habeas corpus relief, in the absence of an evidentiary hearing, however, because

(1) parole eligibility is a collateral, not a direct consequence, of a guilty plea and misinformation thereon does not render a defendant's plea involuntary; and (2) it is unnecessary to communicate parole eligibility requirements to a defendant who desires to plead guilty and thus, defense counsel's erroneous advice thereon does not render counsel ineffective.

In reaching its conclusion, the Eighth Circuit Court of Appeals relied upon a previous decision it had rendered, United States v. DeGand, 614 F.2d 176 (8th Cir. 1980). DeGand claimed that he had not plead guilty with full knowledge of the consequences because the district court failed to inform him that his federal sentence might not run concurrently with his state sentence. The sentencing record

indicated that DeGand had been fully advised of his rights. Defense counsel had advised DeGand that he "hoped" the sentence would run concurrently. In denying relief, the Eighth Circuit stated that the "... erroneous advice of counsel as to the penalty which may be imposed does not, by itself, lead to manifest injustice sufficient to allow a defendant to withdraw his guilty plea." 614 F.2d at 178.

The district court and the Eighth Circuit decisions also relied upon Hunter v. Fogg, 616 F.2d 55 (2d Cir. 1980). The petitioner there sought habeas corpus relief claiming the court, the prosecutor and defense counsel had misled him regarding his guilty plea because he had been misinformed about his parole eligibility date. The defense attorney there advised petition-

er what he "might anticipate" as to parole eligibility but did not promise a definite sentence. Although accepting petitioner's claim he had been misinformed, the Second Circuit stated that "the voluntariness of a guilty plea is not undermined by a lack of explanation as to the mechanics of a parole system." 616 F.2d at 61.

Respondent submits that generally, a defendant need not be informed regarding his parole eligibility because that matter is not a direct consequence of his guilty plea. See, e.g., Trujllo v. United States, 377 F.2d 266 (5th Cir. 1967); United States v. Garcia, 698 F.2d 31 (1st Cir. 1983); Brown v. Perini, 718 F.2d 784, 786 (6th Cir. 1983); United States v. Garcia, 636 F.2d 122, 123 (5th Cir. 1981); Strader v. Garrison, 611 F.2d 61, 65 (4th Cir.

1979); Roberts v. United States, 491 F.2d 1236, 1238 (3d Cir. 1974); Hunter v. Fogg, 616 F.2d at 61 (2nd Cir. 1980); Smith v. United States, 324 F.2d 436, 440-441 (D.C. Cir. 1963). This general principle also applies in Arkansas. Carter v. State, 283 Ark. 23, 670 S.W.2d 439 (1984) (matter of parole lies solely within control of Department of Correction and it would be sheer speculation for attorney or court to advise defendant regarding percentage of time to be served). See also, Deason v. State, 263 Ark. 56, 61, 562 S.W.2d 79 (1978). Since it is unnecessary for a defendant to be informed regarding parole eligibility, it necessarily has followed that erroneous advic on that issue is not grounds on which a guilty plea may be vacated. Brown v. Perini, 718 F.2d at 784, 788; Little v.

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Allsbrook, 731 F.2d 238 (4th Cir. 1984); Hunter v. Fogg, 616 F.2d 55 (2d Cir. 1980). See also, "Adequate Representation -- Guilty Pleas," 10 ALR 4th §33, pp. 185-190 (1981, Supp. Sept. 1984).

Petitioner, as well as the dissenting opinion to the decision rendered below, rely on Strader v. Garrison, supra, in support of their respective positions that a guilty plea should be vacated in such cases. The basis for that position is that a defendant, having plead guilty upon erroneous advice regarding parole eligibility, has not been fully informed of the consequences of his plea. Furthermore, defense counsel who misinforms a defendant has not been effective in his representation and thus, the defendant has been denied his right to competent counsel.

Strader, and a comparison case, O'Tuel v. Osborne, 706 F.2d 498 (4th Cir. 1983) are distinguishable from the circumstances of the instant case. In both cases there was a finding that the petitioner's guilty plea was induced by misadvice of defense counsel regarding parole eligibility.

The Strader Court stated:

> Here, though parole eligibility dates are collateral consequences of the entry of a guilty plea of which a defendant need not be informed if he does not inquire, when he is grossly misinformed, he is deprived of his constitutional right to counsel. When the erroneous advice induces the plea, permitting him to start over again is the imperative remedy for the constitutional deprivation. 611 F.2d at 65.

That Strader and O'Tuel are not controlling is indicated by a later decision rendered by the Fourth Circuit Court of Appeals, Little v. Allsbrook, 731 F.2d 238 (4th Cir. 1984). In the

Little case, petitioner entered a negotiated plea to second degree murder and was sentenced to 25 to 30 years imprisonment. Little testified at his subsequent habeas corpus hearing that defense counsel told him the "deal worked out" was that Little could make parole in five years. Defense counsel denied making any promise to Little regarding the sentence he would receive and told petitioner he would be eligible for parole after serving one-fifth of his maximum sentence, but no maximum sentence had been set as yet.

The district court granted habeas corpus relief because of defense counsel's gross misinformation regarding parole possibilities, relying on Strader and O'Tuel. In reversing the district court and holding those cases

inapplicable, the Fourth Circuit noted that neither petitioner nor defense counsel knew what sentence would be imposed. 731 F.2d at 241. The Court of Appeals stated:

> An attorney's 'bad guess' as to sentencing does not justify the withdrawal of a guilty plea and is no reason to invalidate a plea. In Wellnitz v. Page, 420 F.2d 935 (10th Cir. 1970), the Tenth Circuit held that 'an erroneous sentence estimate by defense counsel does not render a plea involuntary. And a defendant's erroneous expectation, based on his attorney's erroneous estimate, likewise does not render a plea involuntary.' 420 F.2d at 936-7. (citations omitted)
>
> * * *
>
> Here, Little based his alleged expectation of parole eligibility solely on his attorney's sentence estimate and advice as to the parole eligibility formula. Because Little was never given specific assurance as to what his sentence would be, he could not have been "grossly misinformed" about his parole eligibility, and Wilkinson's advice could not have deprived him of his constitutional right to the

> effective assistance of counsel. To permit Little to vitiate his plea on the basis of his purported expectation would distort beyond reason the limits of Strader and O'Tuel and would open the door to habeas relief for all prisoners whose lawyers underestimated the length of their sentences. Such a holding would seriously undermine the finality of judgments entered pursuant to plea bargains.

731 F.2d at 241-242.

Respondent submits the instant case is comparable to Little v. Allsbrook, supra. Neither the State nor defense counsel made any promise to petitioner regarding parole eligibility to be served. In fact, the sentencing hearing indicates the State only recommended to the trial court that a total sentence of 35 years be imposed. Respondent's Appendix, p.A-1,2. In Arkansas, that recommendation is not binding on the trial court. Ark. R. Crim. P. 25.3, Ark. Stat. Ann. Vol. 4A

(Repl. 1977). See also, petitioner's Plea Statement, attached to Respondent's Response, where petitioner indicated he understood the trial court was not required to carry out the negotiated sentence and that power of sentence was with the court only. Respondent's Appendix B, p. B-3 . Although no evidentiary hearing has been held in this case, none is needed since the sentencing hearing is reflected in the state court record and indicates petitioner was aware of his rights and the proceedings. Brown v. Perini, 718 F.2d 784, 787-788 (6th Cir. 1983). No promises, other than the negotiated plea, were made to petitioner regarding parole eligibility as indicated in the state court record. Respondent's Appendix, p. A-4 . Moreover, as indicated by the district court

petitioner possessed not the right but the possibility of parole pursuant to applicable Arkansas statutes. Robinson v. Mabry, 476 F.Supp. 1022 (E.D. Ark. 1979). Defense counsel merely made an erroneous prediction about the amount of time petitioner would have to serve before becoming eligible for parole. That advice did not form the basis of any promise on which petitioner relied when he plead guilty. Thus, petitioner was not denied his right to the effective assistance of counsel.

The decision of the Eighth Circuit Court of Appeals is correct and not in conflict with a decision rendered by the Fourth Circuit Court of Appeals. Further, the decision denying habeas corpus relief is based on sound legal reasoning supported by case law from other jurisdictions.

CONCLUSION

Rule 17.1 of the Rules of the Supreme Court states that review on certiorari will only be granted when there are special and important reasons therefor. Respondent respectfully submits the decision rendered by Eighth Circuit Court of Appeals is in harmony with other jurisdictions and habeas corpus relief was properly denied.

For these reasons, and for the reasons and authorities cited in respondent's brief in opposition to the petition for writ of certiorari, respondent respectfully prays that review on writ of certiorari be denied.

Respectfully submitted,

STEVE CLARK
Attorney General

ALICE ANN BURNS
Deputy Attorney General
Justice Building
Little Rock,AR 72201
501/371-2007

Certificate of Service

I certify that on this 31st day of January, 1985, the foregoing was mailed to Jack T. Lassiter, 2224 South Main Street, P.O. Box 1228, Little Rock, AR 72203.

Alice Ann Burns

RESPONDENT'S APPENDIX

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
FOURTH DIVISION

STATE OF ARKANSAS PLAINTIFF

VS. No. CR-78-1922

WILLIAM LLOYD HILL DEFENDANT

PLEA OF GUILTY

BE IT REMEMBERED, that on the 6th day of April, 1979, the same being a day of the regular March 1979 Term of the Pulaski Circuit Court, Fourth Division, this cause came on to be heard, the State being represented by the Honorable Lloyd Haynes, Deputy Prosecuting Attorney, and the defendant being represented by the Honorable William Patterson, thereupon, the following proceedings were had and done, as follows:

MR. PATTERSON: Your Honor, this is Case CR-78-1922.

THE COURT: William Lloyd Hill. The charge is Murder in the First Degree, Count 1. Count 2 alleges Theft of Property. Is this a negotiated plea?

MR. PATTERSON: Yes, your Honor.

THE COURT: And, what is the negotiated plea for?

MR. HAYNES: Your Honor, the State has agreed upon a plea of guilty to recommend that Mr. Hill receive a total sentence of 35 years in the Arkansas

State Penitentiary.

THE COURT: Thirty-five years on Murder in the First Degree?

MR. HAYNES: Yes, sir, and then the other one will be ten years and that will be concurrent with it for a total of 35.

THE COURT: Are you William Lloyd Hill?

DEFENDANT HILL: Yes, sir.

THE COURT: And you want to plead to this charge with this sentence in mind?

DEFENDANT HILL: Yes, sir.

THE COURT: Are you guilty?

DEFENDANT HILL: Yes, sir.

THE COURT: This Information alleges on October the 1st, 1978, that you did unlawfully, feloniously, with the premeditated and deliberated purpose of causing the death of Darrel Pitts, did cause the death of Darrel Pitts with a .38 caliber pistol. Did you do that?

DEFENDANT HILL: Yes, sir.

THE COURT: It further alleges that you committed a theft of property on an unmentioned date.

MR. HAYNES: Same date, your Honor.

THE COURT: The same date. Is that the way you understood it?

MR. PATTERSON: Yes, sir.

THE COURT: In Pulaski County. It states that for the purpose of depriving the owner of his property, take unauthorized control over property having a value in excess of $100.00, such being the property of Darrel Pitts. Did you do that?

DEFENDANT HILL: Yes, sir.

THE COURT: And, was that on October the 1st, 1978, also?

DEFENDANT HILL: Yes, sir.

THE COURT: All right. Is this your signature on the bottom of this plea statement?

DEFENDANT HILL: Yes, sir.

DEFENDANT HILL: Yes, sir.

THE COURT: Has your attorney explained this statement to you?

DEFENDANT HILL: Yes, sir.

THE COURT: Do you understand it?

DEFENDANT HILL: Yes, sir.

THE COURT: Do you have any questions about it?

DEFENDANT HILL: No, sir.

THE COURT: Any threats or promises made to get you to enter the plea of guilty?

DEFENDANT HILL: No, sir.

THE COURT: Other than the negotiated plea?

DEFENDANT HILL: No, sir.

THE COURT: Tell me shortly just in your own words what happened in this case? Where were you, first, the location?

DEFENDANT HILL: In Little Rock. We started out at a bar, the Gas Light, and he, Darrel Pitts, did something that I didn't like and it ended up in my shooting him and I stole his car. That is basically the run down of the facts.

THE COURT: These things that he did that you didn't like, was it necessary that you shoot him?

DEFENDANT HILL: I felt like it was.

THE COURT: Well, in what respect?

DEFENDANT HILL: Well, he hit me in the teeth with a gun. He also stabbed another person the same night and I just felt threatened by him. I am not saying I should have killed him but that was my way of solving the problem.

THE COURT: Where did you get the pistol?

DEFENDANT HILL: It was his pistol, a 36. Derringer.

THE COURT: Did you take it away from him?

DEFENDANT HILL: No. After he hit me in the teeth with it, when he got in the car he threw it at me and later on, after we took the other guy to the hospital, on the way back that is when I used it and shot him.

THE COURT: Did he have a pistol?

DEFENDANT HILL: No, your Honor. He had a knife.

THE COURT: Was he threatening you with a knife?

DEFENDANT HILL: He didn't have it pointed at me but he had it where it could have been used as a weapon against me.

THE COURT: Was he driving the car at the time you shot him?

DEFENDANT HILL: No. I was driving the car.

THE COURT: You were driving the car? Whose car was it?

DEFENDANT HILL: His car.

THE COURT: What did you do with him after you shot him?

DEFENDANT HILL: Put him in the Arkansas Traveler Motel. It was our room. We were working on a construction crew and being kept at that motel and then I took off and fled the state with his car and his gun.

THE COURT: How did you get him into the room?

DEFENDANT HILL: I carried him in, kinda drug him in.

THE COURT: Well, all things considered, of course, you understand that you are entitled to trial by jury on this case and have them determine your guilt or innocence, as well as fix the punishment in this case. Do you understand that?

DEFENDANT HILL: Yes, sir. I understand that.

THE COURT: You are entitled to call witnesses in your own behalf and cross examine witnesses called by the state. Are you aware of that?

DEFENDANT HILL: Yes, sir; I am.

THE COURT: All things considered, it is your decision after advising with your attorney to enter a plea of guilty on the negotiated plea for 35 years for murder and 10 years for theft of property?

DEFENDANT HILL: Yes, sir; it is.

THE COURT: All right. I accept your plea of guilty. It is the judgment and sentence of this court that you be sentenced to the state penitentiary for a period of 35 years, murder in the first degree; a period of two years for theft of property. The sentences will run concurrently. It is agreed under the negotiated plea. You will be required to serve at least one third of your time before you are eligible for parole. Be assessed the costs of this action. This is on a negotiated plea and recommendation of the state.

MR. PATTERSON: Your Honor, may we get credit for jail time?

THE COURT: How long have you been in jail on this charge?

DEFENDANT HILL: Four months.

MR. PATTERSON: Just about four months, your Honor.

THE COURT: The defendant is allowed credit for four months served. Do you have any questions about the plea or sentence or anything having to do with this case?

DEFENDANT HILL: No, sir.

THE COURT: That is all.

MR. PATTERSON: Thank you, your Honor. May we be excused?

THE COURT: Yes.

(THEREUPON, the Plea of Guilty of William Lloyd Hill was concluded.)

- - -

REPORTER'S CERTIFICATE

I, Marjorie Marie Gachot, Official Court Reporter of the Pulaski Circuit Court, Fourth Division, hereby certify that the above and foregoing pages constituting the Pleas of Guilty contain a true and correct transcript of the proceedings introduced upon these Pleas of Guilty, as taken down by me in machine shorthand at the time and thereafter reduced to typewriting, under my supervision.

WITNESS my hand and seal this 7th day of October, 1980.

/s/Marjorie Marie Gachot
MARJORIE MARIE GACHOT,RPR

MY COMMISSION EXPIRES:
July 13, 1984.
(SEAL)

FILED: October 21, 1980.
Jacquetta Alexander,
Circuit Clerk

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS

STATE OF ARKANSAS PLAINTIFF

vs. DOCKET NO. 78-1922

WILLIAM L. HILL DEFENDANT

PLEA STATEMENT

You are charged with 1st DEGREE MURDER & THEFT OF PROPERTY in the Pulaski County Circuit Court. It is necessary that you fully understand the entire contents of this document.

Your are charged with a ([felony]/ misdemeanor) and with 0 prior convictions. You could receive a sentence of from 5-50 OR Life in the ([state penitentiary]/county jail) and/or a fine of up to $15,000.00.

You have a right to plead not guilty and to be tried before the Court or a jury with the burden on the State of proving your guilt beyond a reasonable doubt. At the trial, you would have the right to testify or not testify. If you were found not guilty, you would be released on the charges for which you were tried. If, after determining the facts with instructions on the law from the court, the jury found you guilty, then they would fix your punishment. If you waive your right to trial by jury and elect a court trial, the court will determine both the facts and the law.

On the other hand, if you are guilty, you have a right to plead guilty to the Judge and the Judge would decide what your sentence should be.

With these thoughts in mind, you must answer each of the following questions and initial your response:

	YES	NO	INITIALS
1. Do you understand the minimum and maximum possible sentences for the offense with which you have been charged?.	X	__	WLH
2. Do you understand that your plea of guilty is a waiver of your right to a trial by jury and of your right to appeal to the Ark. Supreme Court?. . .	X	__	WLH
3. Do you fully understand what you are charged with having done?. . . .	X	__	WLH
4. Have you discussed your case fully with your attorney and are you satisfied with his services? . . .	X	__	WLH

	YES	NO	INITIALS
5. Are you certain that your plea of guilty has not been induced by any force, threat, or promise apart from a plea agreement?. .	X		WLH
6. Do you realize that the Judge is not required to carry out any understanding between you, your attorney, and the prosecuting attorney, and that the power of sentence is with the Court only?. . .	X		WLH

If your answer is "yes" to each of the preceeding questions, and if you fully understand every detail of your guilty plea, then carefully read the following statement and sign in the appropriate space with your lawyer witnessing your signature.

I am aware of everything in this document. I fully understand what my rights are, and I voluntarily plead guilty because I am guilty as charged.

/s/William L. Hill
DEFENDANT'S SIGNATURE

I have carefully explained this document to the accused. To the best of my knowledge he fully understands all of it. His plea of guilty is consistent with the facts he has related to me and with my own investigation of the case.

April 6, 1979 /s/William Patterson,Jr.
DATE ATTORNEY'S SIGNATURE

C E R T I F I C A T I O N

State of Arkansas)
)ss
County of Pulaski)

I, Jacquetta Alexander, Clerk of the Circuit Court, within and for the County and State aforesaid, do hereby certify that the foregoing is a true and correct copy of the Plea Statement on file in this office in the above entitled cause.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court this 8th day of June, 1982.

Jacquetta Alexander, Circuit Clerk

By /s/Brenda Tapley
Deputy Clerk

Office-Supreme Court, U.S.
FILED
MAY 20 1985
ALEXANDER L. STEVAS,
CLERK

(3)

No. 84-1103

In the Supreme Court of the United States

OCTOBER TERM, 1984

WILLIAM LLOYD HILL, PETITIONER

v.

A. L. LOCKHART, Director, Arkansas Department of Correction, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

JACK T. LASSITER
(Appointed by this Court)
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(Counsel for Respondent)

PETITION FOR CERTIORARI FILED DECEMBER 17, 1984
CERTIORARI GRANTED MARCH 18, 1985

75 pp

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Date	PROCEEDINGS
6/30/81	Petition for Writ of Habeas Corpus in the United States District Court Eastern District of Arkansas, Pine Bluff Division, Hill v. Lockhart, PB-C-81-217
6/30/81	Magistrate's Order
7/24/81	Answer and Request of Order to Produce Transcript
6/8/82	Response to Petition for Writ of Habeas Corpus and Exhibits
6/21/82	Traverse and Reply to Respondent's Response to Petition for Writ of Habeas Corpus
12/8/82	Recommended Disposition by Magistrate Referred to Judge Eisele
1/11/83	Petitioner's Objections to Proposed Memo and Order of the United States Magistrate
1/24/83	Statement of Necessity
2/28/83	Order by United States District Court adopting Magistrate's Findings
2/28/83	United States District Court Memorandum and Order (Reproduced in Appendix A-1 to Petition for Writ of Cert)
2/28/83	United States District Court Order denying evidentiary hearing
2/28/83	United States District Court Judgment
3/16/83	Notice of Appeal
3/17/83	Certificate of Probable Cause to Authorize Appeal

Date	PROCEEDINGS
4/9/84	Opinion United States Court of Appeals for the Eighth Circuit, Hill v. Lockhart, 83-1397
	(Reproduced in Appendix B-1 in Petition for Writ of Cert.)
4/19/84	Petition for Rehearing En Banc
9/20/84	United States Court of Appeals for the Eighth Circuit Order upon Rehearing En Banc
	(Reproduced in Appendix C-1 in Petition for Writ of Cert.)

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

Case No. PB-C-81-217

WILLIAM LLOYD HILL, PETITIONER

v.

A. L. LOCKHART, ETC., RESPONDENT
and STEVE CLARK, THE ATTORNEY GENERAL OF THE STATE OF ARKANSAS, RESPONDENT

PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

Filed June 30, 1981

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1. Name and location of court which entered the judgment of conviction under attack—Pulaski County Circuit Court, 4th Division
2. Date of judgment of conviction—4-16-79
3. Length of sentence—35 years
4. Nature of offense involved (all counts)—Murder, 2nd degree & Theft of Property
5. What was your plea? (Check one)
   (a) Not guilty
   (b) Guilty ✔
   (c) Nolo contendere

* * * *

6. Kind of trial (Check one)

   (a) Jury

   (b) Judge only ✓

7. Did you testify at the trial?

   Yes No ✓

8. Did you appeal from the judgment of conviction?

   Yes No ✓

* * * *

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?

    Yes ✓ No

11. If your answer to 10 was "yes", give the following information:

    (a) (1) Name of Court—Pulaski County Circuit Court, 4th Division

    (2) Nature of proceeding—(Rule 37) Motion for Modification (see attached)

    (3) Grounds raised—I) Within jurisdiction, II) incarcerated in Cummins and sentenced 4-6-79, III) serving 35 years under Act 93 (doing ½ before parole eligibility) IV) negotiated plea; 35 years for murder, 10 years for theft concurrent; ⅓ till parole eligibility, V) plea negotiation void by being put under Act 43, VI) double jeopardy.

    (4) Did you receive an evidentiary hearing on your petition, application or motion?

    Yes No ✓

    (5) Result—Denied

    (6) Date of result—10-21-80

    (7) Case number—CR-78-1922

    (8) Citation, if reported—Ark. Stat. Ann. Sec. 43-2829

    (b) As to any second petition, application or motion give the same information:

    (1) Name of court—Pulaski County Circuit Court, 4th Division

    (2) Nature of proceeding—(Rule 26) Motion for Plea Withdraw (see attached)

    (3) Grounds raised—I) Within jurisdiction, II) Sentenced on 4-6-79 doing 35 years; incarcerated at Cummins, III. I understood the plea agreement was 35 years for murder & 10 years concurrent for theft & to do one-third (⅓) less good time until parole, V) Didn't know I could be held under Act 93 when plea agreement stated to do ⅓, IV) didn't receive sentence concessions, VII entitled relief under rule 26.1 C (iii) & (iv) & U.S.C.A. #14

    (4) Did you receive an evidentiary hearing on your petition, application or motion?

    Yes No ✓

    (5) Result—Denied

    (6) Date of result—3-17-81

    (7) Case Number—CR-78-1922

    (8) Citation, if reported—

    (c) As to any third petition, application or motion, give the same information:

    (2) Name of court—Pulaski County Circuit Court, 4th Division

(2) Nature of proceeding—Notice of Appeal & Request for Appointment of Counsel (see attached)

(3) Grounds raised—Denied motion for plea withdraw; traversed and responded to State's Response & Motion for denial (A) (II) stipulation that the Supreme Court of Ark. did not make any *specific provisions* on this matter (B) (III) does *not* define a clause specifically denying relief & State vs. Scermando, 565 SW2d, 414, Haber vs. Shows, 538 SW2d 282 (doubt in favour of defendant)

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes No ✓

(5) Result—Denied

(6) Date of result—4-27-81

(7) Case number—CR-78-1922

(8) Citation, if reported—

(d) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?

(1) First petition, etc. Yes No ✓

(2) Second petition, etc. Yes No ✓

(3) Third petition, etc. Yes No ✓

(e) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

1) did not have a defence against Court's statement the Act 93 couldn't be dealt with in post conviction relief & had no recourse to case cited by court, 2 & 3) Appeal denied

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting same.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted your state court remedies with respect to them. However, *you should raise in this petition all available grounds* (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.

(e) Conviction obtained by a violation of the privilege against self-incrimination.

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(g) Conviction obtained by a violation of the protection against double jeopardy.

(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impanelled.

(i) Denial of effective assistance of counsel.

(j) Denial of right of appeal.

A. Ground one: Negotiated plea was not upheld

Supporting FACTS (tell your story *briefly* without citing cases or law): I agreed to plead guilty with the understanding that I'd get 35 yrs. for 1st degree murder & 10 years concurrent for theft of property, and that I would *only have 1/3 of my sentence to do, less good time.* This negotiation was voided, in that I am being forced to do ½, less good time, until parole eligibility.

B. Ground two: Entered into the guilty plea & plea negotiation without knowledge that sentence could be imposed the way it was.

Supporting FACTS (tell your story *briefly* without citing cases or law): My lawyer told me that a plea negotiation was binding to both

sides and that the Court would impose the sentence agreed to by me and the prosecutor. I did not know that the Court could deviate from the concessions agreed to without informing me, nor that it could say to do ⅓ minimum enstead of just ⅓, until parole.

C. Ground three: Ineffective Assistance of Counsel Supporting FACTS (tell your story *briefly* without citing cases or law): My lawyer did not inform me of Act 93's existence nor applicability to me, nor did he tell me that the Court could decide to impose a different manner of sentence than was agreed to. He also lied to me by saying that I'd only have to do 6 yrs. on my sentence if I stayed out of trouble.

D. Ground four: Not afforded due process on my motion for appeal (also all grounds raised in pertinent petitions, see attached)
Supporting FACTS (tell your story *briefly* without citing cases or law): I received a copy of the State's response to my notice of appeal on 4-28-81. I sent a traverse and reply on 5-1-81, but the Court made its decision on 4-27-81. (I was notified on 5-6-81 of this). The Court did not allow me time to traverse and reply, or the Prosecutor did not send me a copy of his response soon enough for me to have time to reply before Court date.

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them: C) Ineffective assistance of counsel—because I thought my other grounds were sufficient

and because I knew I couldn't really prove it. D) Due process—because it just occurred.

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?

Yes No ✔

If "yes", what court?—

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing—

(b) At arraignment and plea—William Patterson, Public Defender

(c) At trial—William Patterson, Public Defender

(d) At sentencing—William Patterson, Public Defender

(e) On appeal—

(f) In any post-conviction proceeding—

(g) On appeal from any adverse ruling in a post-conviction proceeding

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?

Yes ✔ No

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes No ✔

• • • •

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

Executed at Cummins Prison on May 8, 1981.

/s/ William L. Hill
Signature of Petitioner

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

[Title Omitted]

ORDER

Filed June 30, 1981

Permission is granted to proceed *in forma pauperis* pursuant to 28 U.S.C. § 1915. The Clerk will file and docket this petition without prepayment of fees and costs or security therefor.

The United States Marshal is directed to serve a copy of the petition on the respondent without prepayment of fees and costs or security therefor. The respondent is ordered to answer within twenty (20) days from the date of service.

DATED this 29th day of June, 1981.

/s/ Hoy L. Jones, Jr.
United States Magistrate

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

[Title Omitted]

ANSWER AND REQUEST OF ORDER TO PRODUCE TRANSCRIPT

Comes respondent, through his attorneys, Steve Clark, Attorney General, and William C. Mann, III, Assistant Attorney General, and in answer to the petition for writ of habeas corpus states:

I.

That petitioner is presently incarcerated at the Cummins Unit of the Arkansas Department of Correction as a result of his conviction of murder in the first degree and theft of property on April 6, 1979.

II.

That petitioner has filed a motion under Rule 37 in the Pulaski County Circuit Court and that said motion was denied on October 21, 1980.

III.

That petitioner has not filed an appeal from the denial of relief under Rule 37, nor has he sought a belated appeal from such denial. *Finnie v. State*, 265 Ark. 19, 582 S.W.2d 19 (1979). (See Exhibit A)

IV.

That the grounds of this petition concern the petitioner's guilty plea and that respondent is not aware of any

transcript of the plea proceedings. That without a transcript the respondent lacks sufficient knowledge to respond to the petition.

WHEREFORE, respondent prays that this Court order that a transcript of the plea proceedings be provided at the expense of the United States Government, so that respondent may have sufficient information upon which to frame his response.

Respectfully submitted,

STEVE CLARK
Attorney General

By: /s/ William C. Mann III
WILLIAM C. MANN, III
Assistant Attorney General
Justice Building
Little Rock, Arkansas 72201
(501) 371-2007

Attorneys for Respondent

Filed: July 24, 1981

[Certificate Omitted]

EXHIBIT A

TO WHOM IT MAY CONCERN:

I, Dona L. Williams, Clerk of the Arkansas Supreme Court, to the best of my knowledge, do hereby certify that William Lloyd Hill has not filed an appeal from the denial of relief under Rule 37 filed in Pulaski County Circuit Court, Fourth Division, nor sought a belated appeal from such denial, as of this date, July 23, 1981.

DONA L. WILLIAMS, Clerk

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

[Title Omitted]

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

Comes respondent, by and through his attorneys, Steve Clark, Attorney General, and William C. Mann, III, Assistant Attorney General, and for its response to the petition for writ of habeas corpus, states:

I.

That petitioner is presently incarcerated at the Cummins Unit of the Arkansas Department of Correction as a result of his plea of guilty to first degree murder and theft of property on April 6, 1979. That due to the effect of Act 93 of 1977 (Ark. Stat. Ann. § 2828, 2829), petitioner is required to serve one-half of his sentence, less good time, before parole eligibility. His parole eligibility date is February 1, 1988. (See Exhibit A)

II.

That petitioner has filed a motion pursuant to Rule 37.1 of the Arkansas Rules of Criminal Procedure in the Pulaski County Circuit Court and said motion was denied on October 21, 1980. (See Exhibit B) Petitioner subsequently filed a motion to withdraw his plea pursuant to Rule 26.1 of the Arkansas Rules of Criminal Procedure. This motion was found to be untimely filed and without merit. (See Exhibits C and D) Petitioner evidently did

not appeal the denial of his Rule 37 motion to the Arkansas Supreme Court nor did he seek a belated appeal to that court. However, since more than eighteen months have passed since the denial of his Rule 37 motion, it appears that petitioner has exhausted his state remedies. See Rule 36.9, Arkansas Rules of Criminal Procedure.

III.

That petitioner was represented in this case by William Patterson, who is now deceased.

IV.

Respondent denies that petitioner's negotiated plea was not upheld and contends that petitioner was not mislead in anyway. (Petitioner's Grounds One and Two) As the transcript of the plea proceedings, filed previously with this Court, reflects, petitioner received the exact sentence he bargained for—thirty-five years for first degree murder and ten years for theft of property, the sentences to run concurrently.

Respondent has attached to this response a copy of the Plea Statement signed by petitioner and his attorney. (See Exhibit E) The statement reflects that petitioner was advised of the minimum and maximum sentences he could receive and that he had the right to a jury trial. Petitioner acknowledged that he was aware of these facts and also indicated that he was satisfied with the services of his attorney,

In the transcript of the plea proceedings, the prosecuting attorney and the trial judge set out the details of the negotiated plea agreement as follows:

> MR. HAYNES (DEPUTY PROSECUTING ATTORNEY): Your Honor, the State has agreed upon a plea of guilty to recommend that Mr. Hill receive a total sentence of 35 years in the Arkansas State Penitentiary.

THE COURT: Thirty-five years on Murder in the First Degree?

MR. HAYNES: Yes, sir, and then the other one will be ten years and that will be concurrent with it for a total of 35.

THE COURT: Are you William Lloyd Hill?

DEFENDANT HILL: Yes, sir.

THE COURT: And you want to plead guilty to this charge with this sentence in mind?

DEFENDANT HILL: Yes. sir.

The petitioner then proceeded to admit his guilt and relate the facts of the case to the trial judge. The judge then asked petitioner questions concerning the items listed on the Plea Statement and, after being satisfied that the plea was knowing and voluntary, ruled as follows:

> THE COURT: All right. I accept your plea of guilty. It is the judgment and sentence of this court that you be sentenced to the state penitentiary for a period of 35 years, murder in the first degree; a period of two years for theft of property. The sentences will run concurrently. It is agreed under the negotiated plea. . . .

The trial judge then stated that petitioner would be required to serve *at least* one-third of his sentence before becoming eligible for parole. Finally, at the conclusion of the plea proceedings, when asked if he had any questions about the plea or sentence or anything else about the case, petitioner replied that he did not.

Respondent contends that it is apparent from reading the transcript of the plea proceedings that the plea of guilty was in exchange for the total sentence of thirty-five years on the two charges. The amount of time served before becoming eligible for parole was not part of the plea bargain. The trial judge merely indicated that petitioner would be required to serve *at least* one-third of his sentence before becoming eligible for parole. This was certainly not a promise that petitioner would not have to serve longer than one-third and it cannot be considered a part of the negotiated plea between petitioner and the prosecuting attorney. Further evidence of this fact can be found in the order of the trial court denying petitioner's Rule 37 motion (See Exhibit B), wherein it was said:

> . . . with specific reference to petitioner's first statement about parole eligibility, the Court was merely setting a minimum parole eligibility time to serve when it said "(Y)ou will be required to serve at least one-third of your time before you are eligible for parole."

The actual amount of time required to be served before becoming eligible for parole is controlled by statute.

Respondent respectfully submits that the record of the plea proceedings, the plea statement and the order denying petitioner's Rule 37 motion provide an ample basis for determining that petitioner knowingly and voluntarily entered a plea of guilty. After doing so, petitioner cannot challenge the validity of his knowing and voluntary plea because he has doubts about the wisdom of that choice. *Thundershield v. Solem*, 565 F.2d 1018, 1025 (8th Cir. 1977).

V.

Respondent denies petitioner's allegation that he was denied effective assistance of counsel. Again, it should be noted that petitioner received the exact sentence he bargained for. Counsel certainly could not be deemed ineffective for advising petitioner to plead guilty in light of the facts of the case and in view of the much more severe sentence he could have received had he proceeded to trial and been convicted. Under the law in effect at the time of the commission of the offense, appellant could have received not less than five years nor more than fifty years

or life for the first degree murder charge and an additional consecutive sentence of ten years for the theft of property charge. Thus, it is evident that petitioner received a much lighter sentence in exchange for his guilty plea.

In *United States v. McMillian*, 606 F.2d 245, 247 (8th Cir. 1979), the Eighth Circuit reiterated the test used in this circuit to evaluate the effectiveness of counsel:

> In this circuit, the evaluation of a petition alleging ineffective assistance of counsel involves a two-step process. *Rinehart v. Brewer*, 561 F.2d 261 (8th Cir. 1977). The petitioner must first show that his attorney failed to exercise the customary skills and diligence that a reasonably competent attorney would exercise under similar circumstances. *United States v. Easter*, 539 F.2d 663, 666 (8th Cir. 1976), *cert. denied*, 434 U.S. 844 (1977). Second, the petitioner must demonstrate that he was materially prejudiced in the defense of his case by the actions or inactions of his counsel. *Nevels v. Parratt*, 596 F.2d 344 (8th Cir. 1979); *Morrow v. Parratt*, 574 F.2d 411 (8th Cir. 1978); *Rinehart v. Brewer, supra.*

The Eighth Circuit recently increased the petitioner's burden somewhat by holding that he must *at least* show dereliction of duty in order to prevail. *Zaehringer v. Brewer*, 635 F.2d 734 (8th Cir. 1980); *United States v. Rhodes*, 617 F.2d 1313 (8th Cir. 1980).

It is respectfully submitted that petitioner has not met the heavy burden of proof he bears by merely asserting that his attorney lied to him, especially in view of the clear evidence of the actual bargain petitioner agreed to. Therefore, this ground for relief is without merit.

VI.

Respondent denies that petitioner was denied due process of law. (Petitioner evidently refers to the trial court's denial of his Rule 26 motion). Petitioner does not set out

any violation of his rights under this ground, but merely states he was not given a chance to reply to the prosecutor's response to his motion. The attached orders of the Pulaski County Circuit Court indicate that all pleadings and records from the files on this case were considered by the court in its consideration of petitioner's Rule 26 motion. It was found to be untimely and without merit in that no manifest injustice occurred. Therefore, this ground does not demonstrate any violation of petitioner's rights.

VII.

Respondent denies each and every material allegation not specifically admitted herein.

WHEREFORE, respondent prays that this Court dismiss the petition and deny the relief sought without an evidentiary hearing pursuant to Rule 8(a) of the Rules Governing Section 2254 Cases in the United States District Courts.

Respectfully submitted,

STEVE CLARK
Attorney General

By: /s/ William C. Mann, III
WILLIAM C. MANN, III
Assistant Attorney General
Justice Building
Little Rock Arkansas 72201
(501) 371-2007

Attorneys for Respondent

Filed: June 8, 1982

[Certificate Omitted]

EXHIBIT "A"

AFFIDAVIT

I, Melba Smith, am presently employed at the Arkansas Department of Correction, Cummins Unit, in the capacity of Records Supervisor.

William Lloyd Hill, ADC# 73089, was sentenced on April 6, 1979 to serve a term of 35 years for Murder First Degree, which was committed on, or about October 1, 1978.

Due to a prior prison term on felony charges, he is under Act 93 of 1977, serving one-half (½) of his sentence, less Good Time, before parole eligibility.

As a Class I, he has a parole eligibility date of February 1, 1988.

/s/ Melba Smith
MELBA SMITH

EXHIBIT "B"

IN THE CIRCUIT COURT OF
PULASKI COUNTY, ARKANSAS
FOURTH DIVISION

No. CR-78-1922

WILLIAM L. HILL, PETITIONER

vs.

STATE OF ARKANSAS, RESPONDENT

ORDER

Petitioner, William L. Hill, filed a pro se petition, "Arkansas Code of Criminal Procedure, Rule 37" for "Modification of Sentence". The Court has considered the petition, the response thereto, the transcript of pleas taken, and the files and records of the case and finds conclusively that the petitioner, prisoner, is entitled to no relief. The Court makes the following findings of fact and conclusions of law, specifying those parts of the files or records that are relied upon.

1. Petitioner entered negotiated plans on the following charges on April 6, 1979, in the presence of his attorney, William Patterson: plea of guilty to a charge of first degree murder in Case No. CR-78-1922, and a plea of guilty to a charge of theft of property in Case No. CR-78-1922. These pleas were accepted by the Court and the petitioner was sentenced to 35 years in the State Penitentiary on the murder charge, and to ten (10) years in the State Penitentiary on the theft charge, to run concurrent to the murder sentence. The Court then stated, "(Y)ou will be required to serve at least one-third of your time before you are eligible for parole." See transcript of pleas.

2. Petitioner has alleged several grounds for relief in his Rule 37 petition as set out below.

> a. The judge assessed punishment and entered judgment . . . the defendant to do one-third (⅓) until parole eligibility.
>
> b. The plea negotiation is voided and my confinement is illegal since I'm required to serve one-half (½) instead of one-third (⅓) as I was sentenced because of Act 93.
>
> c. This places me in double jeopardy for the same offense violating my constitutional rights.

3. All of petitioner's allegations considered together regarding the application of Act 93 of 1977 (Ark. Stat. Ann. Sec. 43-2829) by the Arkansas Department of Correction to determine his parole eligibility date do not state a basis for relief within the scope of Rule 37.1 of the Arkansas Rules of Criminal Procedure. With specific reference to petitioner's first statement about parole eligibility, the Court was merely setting a minimum parole eligibility time to serve when it said "(Y)ou will be required to serve at least one-third (⅓) of your time before you are eligible for parole." Furthermore, petitioner's challenge to the manner in which his sentence is being executed is not properly considered in post-conviction relief proceedings. See *Higgins v. State*, 270 Ark. 19, —— SW2d —— (1980).

WHEREFORE, the Court hereby denies this petition for post-conviction relief and orders the Circuit Clerk of Pulaski County to immediately have a copy of this Order served upon the petitioner. If the petitioner seeks to appeal this Order, he must file a Notice of Appeal and Designation of Record with the Pulaski County Circuit Clerk within 30 days of the date of this Order.

/s/ [Illegible]
Circuit Judge

Filed: October 21, 1980

IN THE CIRCUIT COURT OF
PULASKI COUNTY, ARKANSAS
FOURTH DIVISION

———

[Title Omitted]

———

ORDER

On this date this cause comes on for hearing on the pleadings and from the motion, the response thereto and from the files and records of the Court, the Court being well and sufficiently advised finds the defendant's motion is without merit and is hereby denied.

/s/ Harlan A. Weber
Circuit Judge

Filed: April 27, 1981

EXHIBIT "C"

IN THE CIRCUIT COURT OF
PULASKI COUNTY, ARKANSAS
FOURTH DIVISION

[Title Omitted]

ORDER

On this day comes the Court to consider the defendant's Motion for plea withdrawal, filed pursuant to Rule 26, Arkansas Rules of Criminal Procedure and from all matters of fact and law before the Court, the Court doth hereby deny the Motion as not being timely filed and no manifest injustice has occurred.

/s/ Harlan A. Weber
Circuit Judge

Filed: March 17, 1981

EXHIBIT "D"

IN THE CIRCUIT COURT OF
PULASKI COUNTY, ARKANSAS
FOURTH DIVISION

[Title Omitted]

JUDGEMENT

On the 17th day of March, 1981, this cause came on for hearing on the pleadings and from the pleadings and the files and records of the Court, the Court finds that defendant's Motion is without merit and is hereby denied.

This Order having been made on the 17th day of March, 1981, but not signed until now, is entered NUNC PRO TUNC.

/s/ Harlan A. Weber
Circuit Judge

Filed: April 29, 1981

[Certificate Omitted]

EXHIBIT "E"

IN THE CIRCUIT COURT OF
PULASKI COUNTY, ARKANSAS

[Title Omitted]

PLEA STATEMENT

You are charged with 1st Degree Murder & Theft of Property in the Pulaski County Circuit Court. It is necessary that you fully understand the entire contents of this document.

Your are charged with a felony and with 0 prior convictions. You could receive a sentence of from 5-50 or Life in the state penitentiary and/or a fine of up to $15,000.00.

You have a right to plead not guilty and to be tried before the Court or a jury with the burden on the State of proving your guilt beyond a reasonable doubt. At the trial, you would have the right to testify or not testify, if you were found not guilty, you would be released on the charges for which you were tried. If, after determining the facts with instructions on the law from the court, the jury found you guilty, then they would fix your punishment. If you waive your right to trial by jury and elect a court trial, the court will determine both the facts and the law.

On the other hand, if you are guilty, you have a right to plead guilty to the Judge and the Judge would decide what your sentence should be.

With these thoughts in mind, you must answer each of the following questions and initial your response:

1. Do you understand the minimum and maximum possible sentences for the offense with which you have been charged?

Yes ✓ No Initials WLH

2. Do you understand that your plea of guilty is a waiver of your right to a trial by jury and of your right to appeal to the Ark. Supreme Court?

Yes ✓ No Initials WLH

3. Do you fully understand what you are charged with having done?

Yes ✓ No Initials WLH

4. Have you discussed your case fully with your attorney and are you satisfied with his services?

Yes ✓ No Initials WLH

5. Are you certain that your plea of guilty has not been induced by any force, threat, or promise apart from a plea agreement?

Yes ✓ No Initials WLH

6. Do you realize that the Judge is not required to carry out any understanding between you, your attorney, and the prosecuting attorney, and that the power of sentence is with the Court only?

Yes ✓ No Initials WLH

If your answer is "yes" to each of the preceeding questions, and if you fully understand every detail of your guilty pleas, then carefully read the following statement and sign in the appropriate space with your lawyer witnessing your signature.

I am aware of every thing in this document. I fully understand what my rights are, and I voluntarily plead guilty because I am guilty as charged.

Dated Apr. 6, 1979

/s/ William L. Hill
Defendant's Signature

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

Case #PB-C-81-217

WILLIAM LLOYD HILL, PETITIONER

vs.

A. L. LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION, RESPONDENT

TRAVERSE AND REPLY TO RESPONDENT'S RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

Comes now the petitioner, William Lloyd Hill, appearing *pro se* in this cause and for his traverse and reply to respondent's response, states:

I.

Petitioner is presently incarcerated at the Cummins Unit of the Arkansas Department of Correction and is within the jurisdiction of this Honorable Court. Respondent has so stipulated.

II.

Respondent denies that the negotiated plea was not upheld and that the petitioner was misled in any way Respondent contends that the on record conversation between the trial court and the prosecuting attorney establishes the parameters of the plea negotiations and that the time to be served until parole eligibility is not one of

the considerations alluded to therein. Respondent further contends that the fact that the petitioner voiced no protests and asked no questions when given an opportunity to do so proves that the petitioner had received the consessions contemplated by the negotiation. Respondent's denials and contentions are incorrect.

The petitioner has no direct knowledge of what transpired during the period of negotiation carried out between the petitioner's appointed counsel and the prosecuting attorney, however, the negotiated terms presented to the petitioner, by his appointed counsel, did, in fact, include the *clause—to do one-third (1/3) of the sentence, less good time*, prior to parole eligibility. However, if Mr. Patterson is now deceased, as respondent alleges in his response, petitioner has little hope of proving what Mr. Patterson told him the terms of the plea negotiation were. Nevertheless, the fact remains that petitioner believed himself to be pleading guilty in return for a total sentence of thirty-five (35) years and the possibility for parole after having discharged one-third (⅓) of the sentence, less good time allowances.

The petitioner voiced no protests and asked no questions because the trial court stated for the record that it was accepting the negotiated plea of guilty and sentencing petitioner to thirty-five (35) years for first degree murder, and ten (10) years for theft of property, the sentences to run concurrently, and the petitioner to serve at least one-third (⅓) of the sentence until parole eligibility. Since the trial court sentenced petitioner to all of the plea concessions, that the petitioner had been led to expect by Mr. Patterson, the petitioner saw no reason to protest or question anything. The petitioner, after having studied Ark. Stat. Ann. § 43-2828 thru § 43-2830 contends that the trial court's use of the words at least one-third of the sentence until parole eligibility prove that the trial court misrepresented the law in connection with the terms of the plea agreement, and thereby compounded petitioner's misapprehension of the proceedings.

Respondent contends that the amount of time to be served before parole eligibility was not part of the negotiated plea and that, even if it were, it wouldn't make any difference because the trial court merely mentioned a minimum amount of time and didn't promise that the petitioner would not have to serve longer than that. Respondent next contends that the amount of time to be served before parole eligibility could not have been a part of the plea negotiation because the actual amount of time to be served is controlled by statute.

Petitioner denies these contentions. Despite respondent's continual denial, said statement of the trial court appears in respondent's abstract of the record in his response. The trial court's interpretation and acceptance of the plea agreement vis-a-vis parole eligibility was also entered into the court docket. (Petitioner's Exhibit A, resubmitted by attachment hereto.) Petitioner properly relied upon the law as stated by the trial court and petitioner's appointed counsel. Petitioner, therefore, entered into the plea agreements, as stated by Mr. Patterson and the trial court, with the clear understanding that he could hope for release after serving six (6) years in the penitentiary if he diligently sought to rehabilitate himself. He has done so, (see part VI below). Respondent now contends that all of the petitioner's efforts and work toward this end were for nought. He now contends that the Prosecuting Attorney, Defense Attorney, and trial court all misled petitioner about the terms of the plea agreement and sentence because one of the terms was void under Ark. Stat. Ann. § 43-2829, in effect at the time of the agreement. Respondent contends that petitioner's hope, not for parole *per se*, but for a chance to be considered for release under the parole system must be dashed. Respondent contends, as a matter of law, that petitioner cannot hope for parole before serving seventeen and one-half years.

III.

(Petitioner respectfully renews his strenuous objection to being denied a copy of the transcript of record, or access even on a limited basis. Petitioner respectfully submits that it is impossible for him to argue on a transcription of record which he has never seen. Petitioner has some serrious concern in this area because of respondent's allegation that petitioner's appointed counsel is now deceased. If this is true, then petitioner has effectively been denied the right to correct any error that may be in the transcription of the proceedings because of the fact that petitioner couldn't properly ask for a transcript in the state court until he was granted a hearing. No hearing was ever granted.) Petitioner contends that the trial court, Prosecuting Attorney, and Defense Attorney knew, or should have known, about the effect of Ark. Stat. Ann. § 43-2828-thru-§ 43-2830, and should have apprised him of them. In not doing so they misled the petitioner, or allowed him to be misled, about the terms of the plea agreement and their viability under Arkansas law. Ark. Stat. Ann. § 43-2829 B. (2) & (3) states in pertinent part: "Inmates classified as first offenders under this Act [§§ 43-2828 - 43-2830], . . . shall not be elligible for release on parole until a *minimum* of one-third (1/3) of their sentences shall have been served .... Provided, however, that if the trier of fact determines that a deadly weapon *was used in the commission of a crime, first offenders . . . shall not be eligible for release on parole until a minimum of one-half (1/2) of the sentence shall have been served* . . . "(3) Inmates classified as second offenders under this Act . . . shall not be eligible for release on parole until a *minimum* of one-half (1/2) of their sentences shall have been served, with credit for good time allowances, ..." (emphasis added).

Petitioner respectfully submits that his not being apprised of the existence of Ark. Stat. Ann. § 43-2828-thru-§ 43-2830, nor of it's effect upon his sentence, pre-

cluded him from knowingly and voluntarily entering a guilty plea. Petitioner could not have made an informed decision to plead guilty while being ignorant of this essential information and, therefore, Thundershield v. Solem, 565 F.2d 1018, 1025 is no applicable case law. The facts of this case show that the petitioner's guilty plea was unfairly obtained and should be vacated as void, or have corrective measures applied whereby the sentence both conforms to Arkansas law and approximates the conditions petitioner originally was led to believe existed—eligibility for parole consideration after having served six (6) years. Kercheval v. United States, 274 U.S. 220, 224; 47 S.Ct. 582, 71 L.ed. 1009. (This case applies to unfairly obtained guilty pleas.)

IV.

Respondent denies that the petitioner was denied effective assistance of counsel and asserts that the petitioner has not met the burden of proving that his counsel was ineffective. Respondent then concludes that this ground for relief is without merit. Petitioner denies that his appointed counsel was effective. Petitioner contends that it takes more than just advising someone to cop a plea to make one's representation effective, especially if that plea is abrogated by existing law. The ultimate choice to accept the plea, or not to accept it, was the petitioner's. Not his appointed counsel's. Yet, by not informing the petitioner of all of the condition of law that could, or would, apply appointed counsel effectively stripped petitioner of all possibility of making a rational choice. Without such data, petitioner did not and could not rationally weigh the alternatives and make an informed decision to waive his right to a trial.

Even if petitioner's appointed counsel had not actively misled petitioner about the terms of the contract with the State, he passively misled petitioner by failing to correct the erroneous statements of the trial court. It

was the trial court's duty to state the law correctly and to insure that the petitioner's rights were not arbitrarilly violated. Yet, appointed counsel carried the greater weight of this responsibility, since he was charged with petitioner's defense. It was appointed counsel's duty to call the petitioners attention to any errors of law made by the trial court and to ensure that the contract could not be abrogated unilaterally by the state to petitioner's detriment on grounds of legal error. The ineffective representation provided by appointed counsel directly resulted in the dashing of petitioner's hopes of repaying society, and rebuilding his life afterwards, by serving six years and then becoming eligible for parole; which was an explicit part of the contract.

V.

Respondent contends that the parole consideration clause is merely valueless verbiage in the negotiated agreement. Respondent is wrong. Petitioner respectfully points out that under the law as stated by the trial court the minimum parole consideration date claimed by respondent permits hope for parole no sooner than if petitioner had gone to trial and been sentenced to a term of fifty-two and one-half ($52\frac{1}{2}$) years.

Respondent thus denies the intrinsic value of hope in contrast to actual attainment. Petitioner respectfully asks this Honorable Court to note that, not happiness but the persuit of happiness is one of the three rights considered self-evident and inallienable by our founding fathers. By asking this Court to void as worthless the parole consideration clause in the states contract with the petitioner, respondent asks this Court to judicially nullify the value of hope to the incarcerated individual. Yet, can any court put a price tag on hope, or appraise it's value? If hope has no value then it should never have been included in the terms of the contract. Petitioner respectfully submits that no one but petitioner can truthfully say what value the hope of early release for meri-

torious conduct holds for him, not how much that promise of hope influenced his decision to accept the agreement.

VI

As mentioned above petitioner has diligently persued the hope held out by the state. He has voluntered to participate in every rehabilitative program for which his security status and his circumstances make him eligible. Outstanding among these programs is the Cummins Unit Therapeutic Community in which petitioner has undergone intensive treatment to prevent any recurrence of anti-social behavior. In recognition of his personal rehabilitation the Department of Correction has raised petitioner to trustee status. He has received a certificate of appreciation from the Cummins chapter of the J.C.'s. He is currently serving as a volunteer lay-therapist in the Cummins Unit and has applied for a college correspondance course under the G.I. bill with the goal of attaining a degree as a therapist. Had petitioner not applied himself so directly to rehabilitation there might be some merit to respondent's argument that hope of early parole benefits neither the inmate or the state. That is not the case.

VII.

To unilatterally extend the time during which petitioner must be incarcerated without hope of parole, and to do so because petitioner was denied effective assistance of counsel and the protection of the trial court is denial of a fair hearing before an impartial tribunal as guaranteed by the sixth (6th) and fourteenth (14th) amendments of the United States Constitution. To do so by executive fiat of the Department of Correction without a hearing, access to counsel, or any procedural safeguards simply because petitioner is indigent and unable to afford counsel, except as provided by the state, is a denial of Due process of law and Equal protection under those same amendments. That petitioner's state remedies were ex-

hausted, in part, because the incarcerated petitioner was not provided with a copy of the state's response to his notice of appeal (of his rule 26's denial) and request for appointment of counsel until after the court had denied the petition was a further denial of equal protection and due process.

VIII.

Petitioner believes and therefore asserts that the plea (bargain) agreement can best be brought into conformance with the law of the state of Arkansas, while insuring justice is achieved, is to reduce the sentence to a term of years which is within the statutory range of penalties prescribed by Ark. Stat. Ann. § 41-901, for the charged crimes (Ark. Stat. Ann. § 41-1502, and § 21-2203) and which is consonant with the plea bargain negotiated by the state. Petitioner further believes that a term of twenty-three years (23) would fulfill these requirements of law.

Wherefore, the petitioner prays this Honorable Court to remand this cause to the Circuit Court of Pulaski County, Arkansas, with instructions to reduce petitioner's sentence to a term of twenty-three years or in the alternative to grant an evidentiary hearing and appoint able counsel to represent the petitioner; and for any and all other relief to which he may be rightfully entitled.

Date: 6-17-82

Respectfully submitted,

/s/ William L. Hill

PETITIONER'S EXHIBIT A

Case No. CR78-1922

CRIMINAL DOCKET

Date of Orders	ORDERS OF COURT
11-13-78	PLEA NOT GUILTY, JURY TRIAL Apr. 19, '78.
11-13-78	Affidavit of Indigency and in Support filed.
3-12-79	Pre-trial, (Neal)
3-13-79	Order filed directing Sheriff to take defendant for examination.
3-16-79	Motion to Suppress filed.
4- 6-79	Plea of not guilty withdrawn, plea of guilty entered. judgment 35 years. 1/3 parole, costs, negotiated plea.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

[Title Omitted]

PETITIONER'S OBJECTIONS TO THE PROPOSED MEMORANDUM AND ORDER PREPARED BY THE UNITED STATES MAGISTRATE

The Petitioner, William Lloyd Hill, by his attorney, Jack T. Lassiter, in response to the proposed Memorandum and Order prepared by the United States Magistrate hereby designates the following objections to that proposed Memorandum and Order:

1. *The nature of the defendant's state court conviction.*

The Defendant/Petitioner William Lloyd Hill was charged with first degree murder and theft of property in the Pulaski County Circuit Court on November 3, 1978. On April 6, 1979, the defendant entered pleas of guilty and was sentenced to 35 years imprisonment for first degree murder and 10 years imprisonment for theft of property. The sentences were run concurrently. The docket sheet reflects that the sentencing judge ordered the defendant to serve "one-third parole". (Exhibit "A" to Petitioner's Traverse and Reply to Petition for Writ of Habeas Corpus) The petitioner had been previously convicted in Florida for assault and had served eight months in a Florida penitentiary. Therefore, the Petitioner was and continues to be treated as a second offender pursuant to the definition found at Ark. Stat. Ann. § 43-2828(2) and as such is not eligible for parole until having served one-half of his sentence with credit for

good time as required by Ark. Stat. Ann. § 43-2829(3). After an unsuccessful pro se attempt to withdraw his guilty plea, petitioner filed his Petition for Writ of Habeas Corpus. The Respondent State of Arkansas concedes that he has exhausted his state remedies. Based upon the pleadings presented to the magistrate and the transcript of the Petitioner's sentencing hearing, the magistrate prepared the Memorandum and Order suggesting dismissal.

2. *Contentions.*

The magistrate accurately summarized the Petitioner's arguments as three-fold. First, Petitioner argues that his guilty plea was involuntary in that the sentence imposed was in violation of a negotiated plea bargain; secondly, that in the alternative, counsel was ineffective in that he did not accurately advise the Defendant of his parole eligibility date; and third, that the Petitioner was denied due process during his appeal of the court's denial of his motion to withdraw his plea. Petitioner's first two arguments should be restated to allege that his guilty plea was involuntary in that his counsel improperly advised him as to his earliest possible parole eligibility date and as a result of that incorrect advice the Petitioner did not fully understand the consequences of his plea. Therefore, the petitioner asserts that his plea was not voluntarily entered and that he did not receive the effective assistance of counsel. It is Petitioner's contention that both of these allegations merit a hearing to determine whether Petitioner's plea was voluntary and whether he received effective assistance of counsel.

3. *Objections to the magistrate's memorandum and order.*

(a) Objections to the magistrate's proposed finding that the Petitioner's guilty plea was voluntarily entered and that his allegation that he was advised at the time that he would be parole eligible after serving one-third of his sentence less good time does not warrant relief.

As pointed out by the magistrate in page 4 of the proposed Memorandum and Order, to withstand a constitutional challenge a guilty plea must represent "a voluntary and intelligent choice among the alternative courses of action open to the Defendant", citing, *Thundershild vs. Solem*, 565 F.2d 1018 (8th Cir. 1977). The Defendant must understand the consequences of his plea. *Boykin vs. Alabama*, 395 U.S. 238 (1969). At the Petitioner's sentencing hearing the trial court did make inquiry into the voluntariness of the plea as appears in the proposed Memorandum and Order at pages 4 and 5. That inquiry is required by Ark. Rules Crim. Pro., Rule 24.5. The Arkansas Rules of Criminal Procedure do not require that the trial judge inquire as to the Defendant's understanding of potential parole eligibility dates. Several states however consider potential parole conditions to be an important factor at the time a defendant enters a plea and require the trial judge to inquire concerning the Defendant's understanding of parole conditions. The Arizona Rules of Criminal Procedure, Rule 7.2(b) requires a judicial inquiry into the Defendant's understanding of any "special conditions regarding sentence, paroles, or commutations imposed by statute." Illinois Supreme Court Rule 402 requires the trial judge at a guilty plea to advise the Defendant of any mandatory parole attached to a felony conviction.

The magistrate correctly states that the Eighth Circuit has not directly ruled as to whether a state court's failure to advise a Defendant of his parole eligibility date is such a consequence of a guilty plea that it would entitle the Defendant to habeas relief.

The Petitioner contends that his counsel's erroneous advice concerning his potential parole eligibility date was a critical factor in his decision to enter a guilty plea. It was an important consequence of his plea which he

did not understand. As a result of the erroneous information supplied to him by counsel, the plea was not intelligently made. Therefore, this matter should be set for a hearing for a factual determination as to whether or not the Defendant intelligently entered into the negotiated plea in light of the erroneous advice of counsel.

Several jurisdictions have addressed this particular problem. In *People vs. Owsley*, 66 Ill.App.3rd 234, 22 Ill. Dec. 795, 383 N.E.2nd 271 (1978), the Illinois Appellate Court reviewed the order of a circuit court judge summarily dismissing without a hearing the Defendant's petition for post-conviction relief. The Defendant's petition alleged that her trial attorney during plea negotiations had misrepresented the minimum time that she could become parole eligible, eligible for weekend furloughs and work release and thus her guilty plea was rendered involuntary and unknowing. The appellate court held that it was error to summarily dismiss the Defendant's petition for post-conviction relief, where the allegations therein concerning ineffective assistance of counsel were not palpably incredible. That court held that the trial court should determine whether the allegations in the petition when viewed against the record of the guilty plea are so palpably incredible, patently frivolous or false as to warrant summary dismissal, citing *Blackledge vs. Allison*, 431 U.S. 63 (1977). Petitioner's similar allegations in this habeas proceeding are not patently frivolous and do not justify summary dismissal.

In *State of Arizona vs. Holbert*, 114 Ariz. 244, 560 P.2nd 428 (1977) and *Washington vs. Harvey*, 5 Wash. App. 719, 491 P.2nd 660, the trial court's erroneous statement concerning potential parole eligibility dates later resulted in guilty pleas being set aside as involuntary. In *Holbert, supra*, the Defendant pled guilty to second degree armed burglary and armed robbery and was sentenced to concurrent terms of not less than 40 nor more than 60 years on both counts. The Defendant's use of a gun during the commission of the offense rendered him

ineligible for parole until serving the minimum term. None of the attorneys present nor the sentencing judge properly explained the consequences of the statute to the Defendant. The court, while inquiring of the Defendant's understanding of the plea, stated that the Defendant was not eligible for parole until the expiration of five calendar years which was a misstatement of his parole eligibility. Neither the defense attorney nor the prosecutor corrected the judge. The Arizona court found that the plea was, therefore, not knowingly and intelligently made and that the Defendant did not understand the true consequences of his plea.

In *Harvey, supra*, the court erroneously advised the Defendant that the Board of Prison Terms and Paroles could determine what minimum sentence might be set where the consecutive terms imposed by the court created a mandatory minimum term. The court's erroneous advice rendered the plea defective.

Similarly, a prosecuting attorney's advice to a defendant that the parole board could set a minimum term of imprisonment when the law had been amended to deprive the board of that authority was found to be grounds for habeas relief by setting aside the guilty plea as involuntary. *Allen vs. Cranor*, 45 Wash.2nd 25, 272 P.2nd 153 (1954).

The Illinois Supreme Court has held that the trial court's failure to admonish a Defendant concerning a mandatory period of parole when accepting his guilty plea is a factor to be considered in determining the voluntariness of the plea. *People vs. Wills*, 61 Ill.2nd 105, 330 N.E. 2nd 505, *see also, People vs. Blackburn*, 46 Ill.App. 2nd 213, 360 N.E.2nd 1159 (1977).

California has taken a similar position. In *People vs. Tabucchi*, 64 Cal.App. 3rd 133, 134 Cal.Reptr. 245 (1976), the California Court of Appeals held that the failure to advise a Defendant of the statutorily required three year minimum term for parole eligibility rendered the Defendant's guilty plea involuntary. The Defendant had been sentenced to a minimum term of 5 years and mis-

takenly believed that he would be parole eligible after serving one-third of the five year term. However, the Defendant was not eligible for parole under California law until he had served three years of the minimum five year term. The court stated—

> "Recognizing the critical importance to a defendant of the right to parole and recognizing the widespread knowledge of persons charged with crime concerning the 'one-third minimum time' parole policy of the adult authority in usual cases, we believe that notice to a defendant of any statutorily required minimum term for parole eligibility contrary to and of greater duration than the usual adult authority policy based on Penal Code, § 304, is constitutionally required as a pre-requisite to entry of a guilty plea under the rationale of *In Re Tahl, supra.* Such a minimum term for parole eligibility must be deemed a direct rather than a collateral consequence of the guilty plea." (Citations omitted at 251)

It should be pointed out that one court has held that where the Defendant's guilty plea is motivated by his own subjective uncoerced beliefs about future parole eligibility, the plea may not be withdrawn, assuming that it was otherwise knowing and voluntary. *Birts vs. State*, 68 Wis.2nd 389, 228 N.W.2nd 351 (1975). That, of course, is distinguished from the instant case in that the Defendant William Hill was advised by counsel that he would not be eligible for parole until having served one-third of his sentence less good time, specifically, Mr. Hill contends that his attorney advised him that he would be parole eligible in approximately 6 years.

The United States Court of Appeals for the Seventh Circuit set aside a Defendant's guilty plea where he was advised by the court at sentencing that he would get out as quickly as he could if he would be a model prisoner. The Seventh Circuit found that the trial court's advice at sentencing suggested parole eligibility when under the

statute controlling the Defendant's sentence the Defendant was parole ineligible. *Gates vs. United States*, 515 Fed. 2nd 73 (7th Cir. 1975).

In summation, the Petitioner contends that the magistrate erred in denying the Petitioner's request for relief without the necessity of a hearing. Based on the analysis in the aforementioned cases, the Defendant's understanding through advice of counsel as to this potential parole eligibility date raise a fact question as to the voluntariness of his plea. The petitioner contends that the potential parole eligibility date constitutes an important factor in determining the voluntariness of his plea. The issue of voluntariness involves an evaluation of the psychological factors and elements that may be reasonably calculated to influence the human mind. That issue, the Defendant's state of mind at the time he entered the plea, should be decided by the trier of fact. *Blackburn vs. Alabama*, 361 U.S. 199 (1960). The Petitioner should be entitled to a hearing on this matter and a factual determination. The importance of the potential parole eligibility date as a vital consequence of the guilty plea is born out by the affidavits of experienced criminal defense attorneys attached hereto as Exhibit "A" to these objections.

(b) Petitioner's contention that he was denied the effective assistance of counsel by counsel's failure to advise him correctly as to his parole eligibility date.

The magistrate correctly sets forth the test in the Eighth Circuit by citing *Hawkman vs. Parratt*, 661 F.2nd 1161, 1165 (8th Cir. 1981) which stands for the position that the Petitioner in order to prevail on an ineffective assistance of counsel theory must establish that: (1) his attorney failed to exercise the customary skill and diligence that a reasonable and competent attorney would have performed under the same sort of circumstances;

and (2) that his lawyer's ineffectiveness prejudiced him. The advice of counsel must be within the range of competence demanded of attorneys in criminal cases. *Supra*, at 1170 and n.18. The magistrate suggests in the Memorandum and Order that ". . . the fact that petitioner's attorney may have advised him incorrectly as to his parole eligibility date does not render counsel's performance constitutionally inadequate." The magistrate concludes based on the cases cited in his proposed Memorandum and Order that "aspects of traditional parole eligibility need not be communicated to a Defendant. It follows then that even if an attorney's advice concerning such eligibility is not totally accurate, such advice does not render that attorney's performance constitutionally inadequate."

The Petitioner contends that based on the authority cited above that Petitioner's misunderstanding as to his potential parole eligibility date may form the basis of setting aside a guilty plea. The cases in subsection (a) above stand for the proposition that the Defendant's potential parole eligibility date may be an important consequence of his plea. The attorneys' affidavits attached hereto confirm the importance that defendants in criminal cases place on their minimum parole eligibility date. Here, the Petitioner contends that his attorney advised him incorrectly as to the amount of time he would have to serve before becoming parole eligible. Therefore, the Petitioner contends that a viable issue exists as to whether his attorney acted within the range of confidence demanded of attorneys in criminal cases. The Petitioner should be entitled to a hearing with the opportunity to present proof through expert witnesses that incorrect advice as to parole eligibility by defense counsel is not within the range of competence demanded of attorneys in criminal cases.

It is Petitioner's contention that he would not have entered into the negotiated plea had his attorney correctly advised him that he would be required to serve one-

half of his sentence less good time under Arkansas law. Therefore, the Petitioner was prejudiced thereby satisfying the second prong of the test set forth in *Hawkman vs. Parratt, supra.*

(c) Objection to the magistrate's finding that the Defendant's contention that he was denied due process by the trial court's failure to grant his motion to withdraw plea is frivolous.

For the reasons stated in subparagraphs (a) and (b) above, the trial court should have granted the relief requested by petitioner. Petitioner's contention in his habeas petition have now been more artfully stated than they appeared in his motion before the Pulaski County Circuit Court. However, the Petitioner asserts that the trial court should have set the matter for a hearing based on Petitioner's allegations and granted the relief requested for the reasons set forth in the preceding sections of this brief.

WHEREFORE, the Petitioner for the reasons set forth above requests that the United States District Court order that this matter be set for an evidentiary hearing and that the relief requested in the Petition for Writ of Habeas Corpus be granted and all other legal relief to which the Petitioner is entitled.

Respectfully submitted,

/s/ Jack T. Lassiter
JACK T. LASSITER
Attorney for Petitioner
Little Rock, Arkansas 72203

Filed January 11, 1983

[Certificate Omitted]

EXHIBIT "A"

AFFIDAVIT

STATE OF ARKANSAS)
COUNTY OF PULASKI)

TO WHOM THIS MAY CONCERN:

I, Sandra Trawick Berry, on oath do hereby state>

That my experience in the criminal law filed is based on three years of practice as a deputy public defender for the Sixth Judicial District of the State of Arkansas and one year of private practice, during which time one hundred percent of my practice has been devoted to criminal defense. Dissolution of a great majority of the cases on which I served as defense counsel involved plea negotiations and guilty pleas for penitentiary time. It has been my experience that, in such negotiations, the foremost factors with which the defendant is concerned are his parole eligibility date and considerations which might have an effect on that date. Generally, a defendant's decision to accept or reject a negotiated plea turns on the percentage of time he is required by law to serve.

January 11, 1983

/s/ Sandra Trawick Berry
SANDRA TRAWICK BERRY

AFFIDAVIT

STATE OF ARKANSAS)
COUNTY OF PULASKI)

TO WHOM IT MAY CONCERN:

I, Ray Hartenstein, on oath do hereby state:

That my background in criminal law encompasses one year as a law clerk for the Honorable J. Frank Holt of the Arkansas Supreme Court, two years as an assistant attorney general in the Criminal Justice Division of the State Attorney General's Office, a year and a half as Chief Deputy of the Arkansas Appellate Public Defenders Office, and approximately two years in the private practice of law. During this time I have represented numerous criminal defendants and have entered into plea negotiations in many of the cases. Perhaps the most critical factor in the plea negotiations I have been involved with is the actual parole eligibility date. It has been my practice to determine what factors, if any, exist which might have a bearing on my client's eligibility date and to then inform my client as precisely as possible of his earliest possible parole date under the sentence being negotiated. If there are factors which affect the parole eligibility date, I inform my client what they are and how they will affect the sentence he is to receive. It is my opinion that this is a fundamental duty owed by counsel to his client and necessary to fully apprise the client of the consequences of the plea that is being negotiated. I presently and have in the past represented clients in collateral proceedings who were not informed of their parole eligibility date at the time they entered their pleas, and who would not have entered the plea they did had they been so informed. Due to the dramatic effect Act 93 can have on a sentence, I think it is extremely important that the client be made aware of any effect that Act, or similar acts, may have upon the sentence being negotiated.

January 11, 1983

/s/ Ray Hartenstein
RAY HARTENSTEIN

AFFIDAVIT

STATE OF ARKANSAS)
) ss.
COUNTY OF PULASKI)

TO WHOM IT MAY CONCERN:

I, Richard N. Moore, Jr., on oath do hereby state:

That my background in criminal law encompasses three years as deputy prosecuting attorney for the Sixth Judicial District of the State of Arkansas and five and one-half years of private practice, during which time I have represented many criminal defendants as a defense lawyer. During this period of time I have had occasion to enter into plea negotiations on numerous cases and it has been my experience during these negotiations that an important consideration by the defendant is the issue of parole eligibility and the actual date that the defendant might be eligible for parole consideration. This particular issue appears to be as important to many of the defendants as any of the issues being negotiated.

January 10, 1983

/s/ Richard N. Moore, Jr.
RICHARD N. MOORE, JR.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

[Title Omitted]

STATEMENT OF NECESSITY

The Petitioner, William Hill, by his attorney, Jack T. Lassiter, hereby submits the following grounds in support of a request for an evidentiary hearing in this matter:

1. An evidentiary hearing is necessary in this matter because factual issues exist which should be resolved by the trier of fact. The Petitioner herein has filed his objections to the proposed Memorandum and Order prepared by the United States Magistrate which sets forth the legal reasons why a hearing is necessary in order to determine whether the Petitioner's guilty plea at his state court conviction was voluntarily entered.

2. A hearing is necessary to resolve the issue of the voluntariness of the Defendant's plea. The Defendant desires to testify as to his understanding of the plea agreement, the advice given to him by his counsel and his state of mind at the time of entering the plea. Further, the Petitioner intends to use several witnesses who are attorneys in the Little Rock area experienced in the practice of criminal law who will testify as to the importance a criminal defendants place on potential parole eligibility dates when negotiating pleas.

WHEREFORE, the Petitioner requests that the Court grant an evidentiary hearing in order to resolve the factual issues raised in the Petitioner's Petition for Writ of Habeas Corpus and briefed in the Petitioner's

Objections to the Proposed Memorandum and Order Prepared by the United States Magistrate.

Filed: January 24, 1983

Respectfully submitted,

/s/ Jack T. Lassiter
JACK T. LASSITER
Attorney for Petitioner
P.O. Box 1228
Little Rock, Arkansas 72203
(501) 376-1817

[Certificate Omitted]

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

[Title Omitted]

ORDER

The Court has received a Memorandum and Order from Magistrate Henry L. Jones, Jr. After careful review of his findings, the Court adopts them in their entirety.

IT IS, THEREFORE, ORDERED that the petitioner's petition be dismissed.

IT IS SO ORDERED this 28th day of February, 1983.

/s/ Garnett Thomas Eisele
United States District Judge

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

[Title Omitted]

ORDER

Pending before the Court is the petitioner's statement of necessity in support of his request for an evidentiary hearing in this matter. The Court has reviewed the request and petition and finds that petitioner's request must be denied.

The issue in this case is a legal one concerning the voluntariness of a defendant's plea made in conjunction with a plea bargain where he thought that he would be eligible for parole after serving one-third of his sentence, when in fact he was not eligible until he had served one-half of his sentence. The Court has already assumed that the petitioner believed that he had to serve one-third of his term, and has also assumed that his counsel might not have made him aware of the "one-half" rule. Yet as a matter of law, the Court has concluded that the petitioner was not deprived of the benefit of his plea bargain in spite of the lack of clarity with respect to his time to be served before being eligible for parole.

It is therefore Ordered that the petitioner's request for an evidentiary hearing on this matter be, and it is hereby, denied.

Dated this 28th day of February, 1983.

/s/ Garnett Thomas Eisele
United States District Judge

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

[Title Omitted]

JUDGMENT

Judgment is hereby entered pursuant to the Order filed in this matter this date. The petition is dismissed and the relief prayed for is denied.

DATED this 28th day of February, 1983.

/s/ Garnett Thomas Eisele
United States District Judge

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

[Title Omitted]

NOTICE OF APPEAL

Notice is hereby given that William Hill, the Petitioner in the above styled case appeals to the United States Court of Appeals for the Eighth Circuit from the Order of the United States District Court for the Eastern District of Arkansas entered on the 28th day of February, 1983, refusing the relief requested by his Petitioner for Writ of Habeas Corpus.

Filed March 16, 1983

Respectfully submitted,

/s/ Jack T. Lassiter
JACK T. LASSITER
Attorney for Petitioner
Little Rock, Arkansas 72203

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

[Title Omitted]

CERTIFICATE OF PROBABLE CAUSE TO AUTHORIZE APPEAL

I, Honorable G. Thomas Eisele, District Judge in the above entitled cause, in which the Petition for Writ of Habeas Corpus was denied, do hereby certify pursuant to 28 U.S.C. § 2253 (1964), that there exists probable cause for appeal. It is therefore ordered that leave to appeal is granted.

WITNESS my hand and seal as such judge, this 17th day of March, 1983.

/s/ Garnett Thomas Eisele
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 83-1397-EA

WILLIAM LLOYD HILL, APPELLANT

vs.

A. L. LOCKHART, DIRECTOR,
ARKANSAS DEPARTMENT OF CORRECTION, APPELLEE

Appeal from the United States District Court
Eastern District of Arkansas
Pine Bluff Division
The Honorable G. Thomas Eisele, District Judge

PETITION FOR REHEARING EN BANC

The Petitioner, William Lloyd Hill, by his attorney Jack T. Lassiter requests pursuant to F.R.App.Pro. Rules 35(a), (b) and 40 and Rules of the United States Court of Appeals for the Eighth Circuit, Rule 16, that this Court review the opinion of the three judge panel filed on April 9, 1984, by review en banc.

I, Jack T. Lassiter, attorney for Petitioner, based on a reasoned and studied professional judgment, state that this appeal raises the following question of exceptional importance: Where a state court prisoner alleges in a habeas petition that his guilty plea was entered based upon positive misinformation supplied by his trial attor-

ney concerning his potential parole eligibility date, did the District Court err in dismissing the petition finding as a matter of law that it did not raise allegations sufficient to grant habeas relief? The argument rests either on the voluntariness of the prisoner's plea or the denial of his Sixth Amendment right to effective assistance of counsel. The prisoner/appellant alleged in his habeas petition that his attorney had advised him that he would be eligible for parole after one third of his thirty five year sentence less good time. However, the appropriate Arkansas parole eligibility act rendered the petitioner/appellant ineligible for parole until service of one half of his sentence less good time.

/s/ Jack T. Lassiter
JACK T. LASSITER
Attorney for William Hill

The Petitioner William Lloyd Hill asserts that this Petition for Rehearing meets the rigid standards of Rule 35(a) in that this decision involves a case of first impression in the Eighth Circuit and involves a question of exceptional importance.

LOWER COURT ACTION AND SUMMARY OF THREE JUDGE PANEL DECISION

The Petitioner William Lloyd Hill filed a Petition for Writ of Habeas Corpus in the United States District Court for the Eastern District of Arkansas, Western Division, on June 30, 1981. The petition attacked the voluntariness of a guilty plea entered in the Pulaski County Circuit Court on April 6, 1979. This plea was a negotiated plea. Mr. Hill had been charged with first degree murder and theft of property on November 3, 1978, in the Pulaski County Circuit Court. As a result of the negotiated plea Mr. Hill was sentenced to thirty-five years imprisonment for first degree murder with a ten year term running concurrently on a conviction for theft of property. At page six of Mr. Hill's Petition for Writ of Habeas Corpus, Mr. Hill alleged that he entered the guilty plea with the understanding that he would have one-third of his sentence to serve less good time. Mr. Hill alleged that his court appointed attorney informed him that he would only have six years to serve on his sentence if he "stayed out of trouble". Mr. Hill alleged in his petition that his attorney failed to inform him of the impact of Ark. Stat. Ann. § 43-2828(2), and §43-2829(3) known as "Act 93". Under that act, Mr. Hill was rendered ineligible for parole consideration until having served one-half of his term less good time. Mr. Hill had one previous felony conviction, and, therefore, he was ineligible for parole under "Act 93" until having served one-half of his term less good time. The United States District Court Judge G. Thomas Eisele, agreeing with the proposed memorandum of the magistrate, dismissed the petition, stating that as a matter of law it did not warrant relief. (T. 54-67).

Mr. Hill appealed to the Eighth Circuit alleging that the District Court erred in entering an Order denying the Petitioner's request for an evidentiary hearing on his Petition for Writ of Habeas Corpus and finding as a matter of law that Petitioner's contentions concerning the voluntariness of his plea and the incorrect advice of his attorney cannot warrant habeas relief. This case was submitted on September 15, 1983, to the United States Court of Appeals for the Eighth Circuit and the opinion affirming the United States District Court for the Eastern District of Arkansas was filed on April 9, 1984, with the Honorable Floyd R. Gibson, Senior Circuit Judge, and the Honorable John R. Gibson, Circuit Judge, voting with the majority opinion, and the Honorable Circuit Judge Gerald W. Heaney dissenting.

The majority opinion held that the parole eligibility date was not part of the plea bargain and that the state bargained simply that Hill would serve no longer term than that to which the judge sentenced him. (majority opinion at 5 and 6) The Court also held that the details of parole eligibility are considered a collateral rather than a direct consequence of a plea for which a Defendant need not be informed before pleading guilty. (majority opinion at 4) The majority opinion addressed *Strader v. Garrison*, 611 F.2d 61 (4th Cir. 1979) and attempted to distinguish it arguing that the alleged misadvice of counsel here did not constitute the same "gross misinformation" as occurred in *Strader*. In addressing the argument of Petitioner that his counsel's misadvice constituted ineffective assistance of counsel, the majority opinion stated that even if the allegations concerning counsel's misadvice were correct, that those allegations did not amount to constitutionally inadequate performance and did not constitute a dereliction of duty sufficient by itself to allow the Petitioner to withdraw his guilty plea.

In dissent Circuit Judge Heaney agreed with the Fourth Circuit cases of *Strader v. Garrison, supra,* and

O'Tuel v. Osborne, 706 F.2d 498, 500 (4th Cir. 1983), which stand for the position that an attorney who wrongfully informs a client contemplating a plea bargain that the client will spend less time incarcerated than the published law mandates has acted incompetently. The dissenting opinion reviews *Strader* pointing out that there the Defendant's lawyer assured his client that by pleading guilty and accepting a thirty-year sentence to run concurrently with a prior sentence, the Defendant would not extend his prior parole eligibility date. However, state law was different. His potential parole eligibility date was extended by several years as a result of the additional concurrent sentence. The dissenting opinion reviews *O'Tuel v. Osborne*, *supra*, finding that it stands for the position that an attorney acts ineffectively when he fails to discover the applicable statute for parole eligibility had been amended, and consequently informs his client that he would be eligible for parole after ten years when he was actually ineligible for parole until serving twenty years. The dissenting opinion also distinquishes *United States v. Degand*, 614 F.2d 176 (8th Cir. 1980) relied upon by the majority in that the advice given by Degand's attorney to Degand concerning concurrent sentencing gave the Petitioner there only a "hope of leniency" rather than constituting a misreading of the law. The dissenting opinion goes on to point out that nothing at Hill's plea hearing would have alerted him to his attorney's error and that the trial court reinforced the attorney's error by stating that Hill would have to serve at least one-third of his sentence.

The dissenting opinion also differs with the majority over the interpretation of the "gross misconduct" standard referred to in *Strader*. The dissent finds that the magnitude of the alleged oversight in this case was no less than in *Strader*, *supra*, and *O'Tuel*, *supra*. The dissent states that this case does not rest on a requirement that the state court inform Hill of his parole eligibility date. The dissent points out that the collateral consequence rule should not bar an ineffective assistance of counsel claim where an attorney's misadvice respecting a collateral consequence induces a Defendant to plead guilty.

ARGUMENT IN SUPPORT OF PETITION

To withstand a constitutional challenge a guilty plea must represent a voluntary and intelligent choice among the alternate courses of actions open to a Defendant. *Rouse v. Foster*, 672 F.2d 649, 651 (8th Cir. 1982). The Defendant must understand the consequences of his plea. *Boykin v. Alabama*, 395 U.S. 238 (1969). A plea cannot be truly voluntary unless the Defendant possesses an understanding of the law in relation to the facts. *Johnston v. Zerbst*, 304 U.S. 458, 466 (1938). However, it has been held that the details of parole eligibility are a collateral consequence of a plea. *Hunter v. Fogg*, 616 F.2d 55 (2d Cir. 1980) and *Trujillo v. United States*, 377 F.2d 266 (5th Cir.)

In this case the Petitioner need not take issue with the collateral/direct consequence distinction raised by the majority opinion. Mr. Hill squarely places before the Eighth Circuit for the first time the question of whether a plea can be rendered involuntary as a result of ineffective assistance of counsel where counsel misadvises the petitioner as to the time the petitioner must serve before he may become parole eligible. In the instant case, the Petitioner alleged that his attorney advised him that he would potentially be parole eligible after serving one-third of his sentence less good time or six years. The applicable state law rendered him ineligible for parole until serving one-half of his sentence less good time or nine years. The Petitioner requests a rehearing en banc in that this decision is one of special importance since it is of first impression before the Eighth Circuit and of extraordinary importance in that this decision could result in the summary dismissal of any habeas petition resting on allega-

tions of misadvice of counsel concerning potential parole eligibility dates.

Although the Petitioner agrees that no one can predict the actual time that any prisoner will serve, the critical importance of the earliest potential parole eligibility date when negotiating a guilty plea cannot be ignored. Attach to the objections of the Petitioner to the proposed memorandum and order of the magistrate were affidavits of three attorneys actively engaged in criminal defense work (T. 68-83). Those affidavits stand for the proposition that the potential parole eligibility date constitutes one of the foremost factors in the accused's decision of whether or not to accept a plea offer. To refuse to recognize the potential parole eligibility date as an important factor during plea negotiations is to ignore the most critical consideration in most negotiations. The Petitioner believes that the majority opinion is in error stating that a mistake amounting to a three year difference in a potential parole eligibility date does not constitute "gross misconduct" on the part of the attorney for petitioner under the majority's interpretation of the *Strader* test.

Other courts have recognized the importance of the potential parole eligibility date in the plea bargaining process. In *People v. Owsley*, 66 Ill. App. 3d 234, 383 N.E.2d 271 (1978), the Illinois Appellate Court reviewed the order of a lower court judge summarily dismissing without a hearing (as was the case here) a petition for post-conviction relief alleging that the defendant's trial attorney during plea negotiations misrepresented among other things the time she would serve before becoming parole eligible. The appellate court held that is was error to summarily dismiss the petition. Erroneous statements by the trial court concerning potential parole eligibility dates have resulted in guilty pleas being set aside by appellate courts as involuntary. See, *Arizona v. Holbert*, 114 Ariz. 244, 560 P.2d 428 (1977) and *Washington v. Harvey*, 5 Wash. App. 719, 491 P.2d 660 (1971). A prosecuting attorney's erroneous advice to a defendant

concerning potential parole eligibility has been held to render a plea involuntary. *Allen v. Cranor*, 45 Wash. 2d 25, 275 P.2d 153 (1954) and *see also, Baker v. Finkbeiner*, 551 F.2d 180 (7th Cir. 1977). Although neither F.R.Crim.Pro. Rule 11(c)(1) nor Ark.Rules.Crim.Pro. require that the Court explain parole eligibility information to a defendant, not all courts have agreed with that approach. *See People v. Tabucchi*, 64 Cal. App. 3d 133, 134 Cal. Rptr. 245 (1976), and *People v. Wills*, 61 Ill.2d 105, 330 N.E.2d 505 (1975).

The dissenting opinion's explanation of the distinction between *United States v. Degand*, 614 F.2d 176 (8th Cir. 1980) and this case is of particular importance. Here the petitioner alleged in his habeas petition that he had received positive misinformation from his attorney. The allegations in the petition do not express communications which only provided "hopes". The allegations stated that his attorney directly misadvised him as to his potential parole eligibility date.

In holding that petitioner's allegations could not constitute grounds for habeas relief, the majority opinion fails to recognize one of the most critical functions that an attorney can perform during the plea negotiation process. It is no doubt that the majority opinion will result in some increased judicial economy for the courts, but that consideration should not prevail over Petitioner's Sixth Amendment right to effective assistance of counsel.

Respectfully submitted,

/s/ Jack Lassiter
JACK T. LASSITER

Filed, April 19, 1984

[Certificate Omitted]

IN THE CIRCUIT COURT OF
PULASKI COUNTY, ARKANSAS
FOURTH DIVISION

No. CR-78-1922

STATE OF ARKANSAS

vs.

WILLIAM LLOYD HILL

PLEA OF GUILTY

BE IT REMEMBERED, that on the 6th day of April, 1979 the same being a day of the regular March 1979 Term of the Pulaski Circuit Court, Fourth Division, this cause came on to be heard, the State being represented by the Honorable Lloyd Haynes, Deputy Prosecuting Attorney, and the defendant being represented by the Honorable William Patterson, thereupon, the following proceeding were had and done, as follows:

MR. PATTERSON:
Your Honor, this is Case CR-78-1922.

THE COURT: William Lloyd Hill. The charge is Murder in the First Degree, Count 1. Count 2 alleges Theft of Property. Is this a negotiated plea?

MR. PATTERSON: Yes, your Honor.

THE COURT: And, what is the negotiated plea for?

MR. HAYNES: Your Honor, the State has agreed upon a plea of guilty to recommend that Mr. Hill receive a total sentence of 35 years in the Arkansas State Penitentiary.

THE COURT: Thirty-five years on Murder in the First Degree?

MR. HAYNES: Yes, sir, and then the other one will be ten years and that will be concurrent with it for a total of 35.

THE COURT: Are you William Lloyd Hill?

DEFENDANT HILL: Yes, sir.

THE COURT: And you want to plead guilty to this charge with this sentence in mind?

DEFENDANT HILL: Yes, sir.

THE COURT: Are you guilty?

DEFENDANT HILL: Yes, sir.

THE COURT: This Information alleges on October the 1st, 1978, that you did unlawfully, feloniously, with the premeditated and deliberated purpose of causing the death of Darrel Pitts, did cause the death of Darrel Pitts by shooting the said Darrel Pitts with a .38 caliber pistol. Did you do that?

DEFENDANT HILL: Yes, sir.

THE COURT: It further alleges that you committed a theft of property on an unmentioned date.

MR. HAYNES: Same date, your Honor.

THE COURT: The same date. Is that the way you understood it?

MR. PATTERSON: Yes, sir.

THE COURT: In Pulaski County. It states that for the purpose of depriving the owner of his property, take unauthorized control over property having a value in excess of $100.00, such being the property of Darrel Pitts. Did you do that?

DEFENDANT HILL: Yes, sir.

THE COURT: And, was that on October the 1st, 1978, also?

DEFENDANT HILL: Yes, sir.

THE COURT: All right. Is this your signature on the bottom of this plea statement?

DEFENDANT HILL: Yes, sir.

THE COURT: Has your attorney explained this statement to you?

DEFENDANT HILL: Yes, sir.

THE COURT: Do you understand it?
DEFENDANT HILL: Yes, sir.
THE COURT: Do you have any questions about it?
DEFENDANT HILL: No, sir.
THE COURT: Any threats or promises made to get you to enter the plea of guilty?
DEFENDANT HILL: No, sir.
THE COURT: Other than the negotiated plea?
DEFENDANT HILL: No, sir.
THE COURT: Tell me shortly just in your own words what happened in this case? Where were you, first, the location?
DEFENDANT HILL: In Little Rock. We started out at a bar, the Gas Light, and he, Darrel Pitts, did something that I didn't like and it ended up in my shooting him and I stole his car. That is basically the run down of the facts.
THE COURT: These things that he did that you didn't like, was it necessary that you shoot him?
DEFENDANT HILL: I felt like it was.
THE COURT: Well, in what respect?
DEFENDANT HILL: Well, he hit me in the teeth with a gun. He also stabbed another person the same night and I just felt threatened by him. I am not saying I should have killed him but that was my way of solving the problem.
THE COURT: Where did you get the pistol?
DEFENDANT HILL: It was his pistol, a 36. Derringer.
THE COURT: Did you take it away from him?
DEFENDANT HILL: No. After he hit me in the teeth with it, when he got in the car he threw it at me and later on, after we took the other guy to the hospital, on the way back that is when I used it and shot him.
THE COURT: Did he have a pistol?
DEFENDANT HILL: No, your Honor. He had a knife.
THE COURT: Was he threatening you with a knife?
DEFENDANT HILL: He didn't have it pointed at

me but he had it where it could have been used as a weapon against me.
THE COURT: Was he driving the car at the time you shot him?
DEFENDANT HILL: No. I was driving the car.
THE COURT: You were driving the car? Whose car was it?
DEFENDANT HILL: His car.
THE COURT: What did you do with him after you shot him?
DEFENDANT HILL: Put him in the Arkansas Traveler Motel. It was our room. We were working on a construction crew and being kept at that motel and then I took off and fled the state with his car and his gun.
THE COURT: How did you get him into the room?
DEFENDANT HILL: I carried him in, kinda drug him in.
THE COURT: Well, all things considered, of course, you understand that you are entitled to trial by jury on this case and have them determine your guilt or innocence, as well as fix the punishment in this case. Do you understand that?
DEFENDANT HILL: Yes, sir. I understand that.
THE COURT: You are entitled to call witnesses in your own behalf and cross examine witnesses called by the state. Are you aware of that?
DEFENDANT HILL: Yes, sir; I am.
THE COURT: All things considered, it is your decision after advising with your attorney to enter a plea of guilty on the negotiated plea for 35 years for murder and 10 years for theft of property?
DEFENDANT: Yes, sir; it is.
THE COURT: All right. I accept your plea of guilty. It is the judgment and sentence of this court that you be sentenced to the state penitentiary for a period of 35 years, murder in the first degree; a period of two years for theft of property. The sentences will run concurrently. It is agreed under the negotiated plea. You will

be required to serve at least one third of your time before you are eligible for parole. Be assessed the costs of this action. This is on a negotiated plea and recommendation of the state.

MR. PATTERSON: Your Honor, may we get credit for jail time?

THE COURT: How long have you been in jail on this charge?

DEFENDANT HILL: Four months.

MR. PATTERSON: Just about four months, Your Honor.

THE COURT: The defendant is allowed credit for four months served. Do you have any questions about the plea or sentence or anything having to do with this case?

DEFENDANT HILL: No, sir.

THE COURT: That is all.

MR. PATTERSON: Thank you, your Honor. May we be excused?

THE COURT: Yes.

(THEREUPON, the Plea of Guilty of William Lloyd Hill was concluded.)

Filed: October 21, 1980

[Certificate Omitted]

SUPREME COURT OF THE UNITED STATES

No. 84-1108

WILLIAM LLOYD HILL, PETITIONER

v.

A. L. LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION

ORDER ALLOWING CERTIORARI

Filed March 18, 1985

The petition herein for a writ of certiorari to the *United States Court of Appeals for the Eighth Circuit* is granted.

Justice Powell took no part in the consideration or decision of this petition.

SUPREME COURT OF THE UNITED STATES

No. 84-1103

WILLIAM LLOYD HILL, PETITIONER

v.

A. L. LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION

ON CONSIDERATION of the motions of petitioner for leave to proceed further herein *in forma pauperis* and for appointment of counsel,

IT IS ORDERED by this Court that the said motions be, and the same are hereby, granted, and that Jack T. Lassiter, Esquire, of Little Rock, Arkansas, is appointed to serve as counsel for the petitioner in this case.

April 29, 1985

Office-Supreme Court, U.S.
FILED
MAY 30 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1103

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

WILLIAM LLOYD HILL,

Petitioner,

v.

A. L. LOCKHART DIRECTOR,
ARKANSAS DEPARTMENT OF CORRECTION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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BRIEF OF PETITIONER

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QUESTION PRESENTED FOR REVIEW

Is the petitioner, a state prisoner, entitled to an envidentiary hearing in a United States District Court habeas corpus proceeding where the petitioner has alleged in his habeas petition that his state court negotiated guilty plea was involuntary and resulted from ineffective representation of counsel in that his attorney misadvised him as to his potential parole elibility date and as a result of that advice the petitioner accepted the plea offer and entered the guilty plea?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Authorities Continued

CITATION TO THE OPINION AND JUDGMENT IN THE COURTS BELOW

The decision of the United States Court of Appeals for the Eighth Circuit is reported at 731 F.2d 568 (8th Cir. 1984), and is reproduced in the Petition for Writ of Certiorari in the Appendix thereto at Appendix B. The opinion of the United States District Court for the Eastern District of Arkansas, Western Division, was an unreported decision. The Memorandum and Order of the United States District Court is reproduced in the Petition for Writ of Certiorari in Appendix A.

STATEMENT OF JURISDICTIONAL GROUNDS

The opinion of the United States Court of Appeals for the Eighth Circuit was filed on April 9, 1984. (Petition for Writ of Certiorari, Appendix B.) A Petition for Rehearing en Banc was filed by the petitioner. Rehearing en Banc was granted. An order was entered by an equally divided court affirming the judgment of the District Court on September 20, 1984. (Petition for Writ of Certiorari, Appendix C.) The mandate of the Eighth Circuit was issued on October 15, 1984. A Writ of Certiorari was sought from this Court pursuant to 28 U.S.C. § 1254(1) and 28 U.S.C. § 2101(c). The Petition for Writ of Certiorari was filed in this Court on December 17, 1984. The ninety day filing requirement for the Petition for Writ of Certiorari pursuant to 28 U.S.C. § 2101(c) was complied with. Certiorari was granted on March 18, 1985.

The jurisdictional basis of the United States District Court for the Eastern District of Arkansas rested upon 28 U.S.C. § 2254. The appellate jurisdiction of the United States Court of Appeals for the Eighth Circuit rested upon 21 U.S.C. § 1291.

STATEMENT OF INVOLVED CONSTITUTIONAL PROVISIONS AND STATUTORY PROVISIONS

Amendment VI of the United States Constitution states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and District wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment XIV of the United States Constitution, Section 1 states:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ark. Stat. Ann. § 43-2828(2) states:

> Second offenders shall be inmates convicted of two or more felonies and who have been once incarcerated in some correctional institution in the United States, whether local, state, or federal, for a crime which was a felony under the laws of the jurisdiction in which the offender was incarcerated, prior to being sentenced to a correctional institution in this State for the offense or the offenses for which they are being classified.

Ark. Stat. Ann. § 43-2829(3) states:

> Inmates classified as second offenders under this Act upon entering a correctional institution in this State under sentence from a circuit court shall not be eligible for release on parole until a minimum of one-half (½) of their sentence shall have been served, with credit for good time allowances, or one-half (½) of the time to which sentence is commuted by executive clemency, with credit for good time allowances.

STATEMENT OF THE CASE

The petitioner William Lloyd Hill, a prisoner in the Arkansas Department of Correction, filed a "Petition for Writ of Habeas Corpus By Person In State Custody" with the United States District Court, Eastern District of Arkansas, Western Division, on June 30, 1981. (J.A. 3) That Petition, *inter alia*, attacked the voluntariness of a guilty plea entered in the Pulaski County, Arkansas, Circuit Court in 1979. (J.A. 8-9) The State of Arkansas had charged Mr. Hill with first degree murder and theft of property. The negotiated plea entered into by Mr. Hill resulted in a sentence of thirty-five years imprisonment for first degree murder with a ten year concurrent term on a theft of property conviction. (J.A. 66-70) In his Petition for Writ of Habeas Corpus, Mr. Hill alleged that his attorney informed him that he would only have six years to serve on his sentence if he "stayed out of trouble." (J.A. 9) He alleged that his attorney failed to inform him of the ramifications of Ark. Stat. Ann. § 43-2828(2) and § 43-2829(3), known as Act 93. (J.A. 9) These sections govern potential parole eligibility requiring a lengthier term for second offenders. As a result of a previous Florida conviction, Mr. Hill was a second offender under the act, and was not and is not eligible for parole consideration until having served one-half of his term less good time or approximately nine years. The United States District Court entered an order on March 2, 1983, denying the petitioner's request for an evidentiary hearing. (Petition for Writ of Certiorari Appendix A.) Mr. Hill

appealed to the United States Court of Appeals for the Eighth Circuit asserting that he was entitled to an evidentiary hearing in regard to the voluntariness of his plea and the competency of his court appointed attorney. The three judge panel of the Eighth Circuit by a two to one vote affirmed the decision of the United States District Court. *Hill* v. *Lockhart*, 731 F.2d 568 (8th cir. 1984). (Petition for Writ of Certiorari, Appendix B.) Mr. Hill petitioned for Rehearing en Banc. Rehearing en Banc was granted. By a five/five split vote the Eighth Circuit affirmed the decision of the United States District Court. (Petition for Writ of Certiorari Appendix C.) The Petition for Writ of Certiorari was timely filed in this Court on December 17, 1984. On March 18, 1985, the United States Supreme Court granted the Petition for Writ of Certiorari.

SUMMARY OF THE ARGUMENT

Petitioner William Hill argues that he is entitled to an evidentiary hearing in the United States District Court on his Petition for Writ of Habeas Corpus which alleged that his counsel misadvised him as to his potential parole eligibility date and, relying on that advice, Mr. Hill entered a plea of guilty. Mr. Hill contends that the positive misinformation supplied by his attorney, who overlooked an easily accessible and published state law, renders his plea involuntary. Mr. Hill also contends that this information supplied by his attorney and upon which he relied violated his Sixth Amendment right to effective assistance of counsel in that counsel's performance was deficient and adversely affected the outcome of the proceeding under *Strickland* v. *Washington*, 104 S.Ct. 2052 (1984). Mr. Hill contends that his attorney's action violated the gross misconduct standard utilized by the United States Court of Appeals for the Fourth Circuit in *Strader* v. *Garrison*, 611 F.2d 61 (4th Cir. 1979).

ARGUMENT

The petitioner William Hill was charged with first degree murder and theft of property in the Pulaski County Circuit Court in Little Rock, Arkansas, in 1978. In 1979 Mr. Hill entered negotiated pleas to both charges. He received a sentence of 35 years on the first degree murder charge and a concurrent sentence of ten years on the theft of property charge. (J.A. 69)

In effect at the time of Mr. Hill's guilty pleas was a state law governing potential parole eligibility requiring service of a longer term for second offenders before they could become eligible for parole. Ark. Stat. Ann. §§ 43-2828(2) and 2829(3), hereinafter referred to as Act 93. Mr. Hill is and was a second offender under this act and was not and is not eligible for parole as such until having served one-half of his sentence with credit for good time, or approximately nine years. Mr. Hill contended in his Petition for Writ of Habeas Corpus that his appointed attorney advised him prior to entering the guilty pleas that he would be parole eligible after serving one-third of his sentence less good time or approximately six years. (J.A. 9) Petitioner alleged in his Petition for Writ of Habeas Corpus that his plea was not voluntary as a result of the erroneous advice of counsel and that he did not receive effective representation as required by the Sixth Amendment of the United States Constitution. (J.A. 8-9)

The United States District Court for the Eastern District of Arkansas, Western Division, by Judge G. Thomas Eisele, found that Mr. Hill had failed to state an actionable claim under habeas corpus proceedings and dismissed the petition without an evidentiary hearing. (Petition for Writ of Certiorari, Appendix A.) The case was appealed to the United States Court of Appeals for the Eighth Circuit. In a split decision the three judge panel

affirmed. *Hill* v. *Lockhart*, 731 F.2d 568 (8th Cir. 1984). (Petition for Writ of Certiorari, Appendix B.) Following the granting of a Petition for Rehearing en Banc, the Eighth Circuit Court of Appeals split evenly thereby affirming the decision of the lower court. (Petition for Writ of Certiorari, Appendix C.)

Mr. Hill contends that his counsel's erroneous advice concerning his parole eligibility date was a critical factor in his decision to enter the guilty pleas. As pointed out in the United States District Court's Memorandum and Order (Petition for Writ of Certiorari, Appendix A-11), Mr. Hill will have to serve at least nine years of the thirty-five years before he can become eligible for parole. If he were parole eligible as he had anticipated, he would have to serve six years before meeting the parole board.

Respondent admits in the Brief in Opposition to the Petition for Writ of Certiorari that William Hill was misinformed by both his attorney and the Court as to his parole eligibility date. (Brief For Respondent in Opposition to Petition p. 3).

This Court has stated that a plea cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts. *Johnston* v. *Zerbst*, 304 U.S. 458, 468 (1938). The critical importance of the earliest potential parole eligibility date when negotiating a guilty plea cannot be ignored. Attorneys' affidavits were provided to the United States District Court confirming the importance of an attorney's advice to his client concerning parole eligibility in negotiating pleas. These three affidavits were those of attorneys actively engaged in the practice of criminal defense work. (J.A. 48-50)

The United States Court of Appeals for the Eighth Circuit held that the information Mr. Hill allegedly received from his attorney regarding his parole eligibility was not sufficient to render his guilty plea involuntary as a matter of law. *Hill*, *supra*, at 571. (Petition for Writ of Certiorari, Appendix B-7). Further, the United States Court of Appeals for the Eighth Circuit, relying on the reasoning of the United States District Court, found that it was undesirable that claimed misadvice on parole eligibility could potentially render pleas involuntary. *Hill*, *supra*, at 572. (Petition for Writ of Certiorari, Appendix B-7.) The petitioner contends that the Eighth Circuit holding is in error and that he is entitled to an evidentiary hearing on the issue of the voluntariness of his guilty plea and the effective assistance of counsel.

The United States Court of Appeals for the Fourth Circuit regards as incompetent an attorney who wrongly informs a client contemplating a plea bargain that the client will spend less time incarcerated than the published law mandates. *O'Tuel* v. *Osborne*, 706 F.2d 498, 500 (4th Cir. 1983); and *Strader* v. *Garrison*, 611 F.2d 61, 63 (4th Cir. 1979).

In *Strader*, *supra*, the defendant's lawyer assured his client that by pleading guilty and accepting a thirty year sentence to run concurrently with a prior sentence, the defendant would not extend his potential parole eligibility date. However, state law was different. His potential parole eligibility date was extended by several years as a result of the additional concurrent sentence. Strader's plea was determined to be involuntary.

In *O'Tuel*, *supra*, the attorney failed to discover that the applicable statute for parole eligibility had been amended and consequently informed his client that he would be eligible for parole after ten years when he was actually ineligible for parole until serving twenty years. O'Tuel's plea was rendered involuntary.

In *Strader, supra,* the attorney's actions are described as "gross misconduct." Following the *Strader* standard, the petitioner asserts that a difference in time served of three years before potential parole eligibility meets the *Strader* "gross misconduct" standard. The majority opinion and the dissenting opinion of the United States Court of Appeals for the Eighth Circuit in the instant case differed over the interpretation of the meaning of gross misconduct under *Strader, supra.* The majority opinion concluded that counsel's advice concerning Mr. Hill's parole eligibility even if not wholly-accurate did not constitute such an inadequate performance as to allow Mr. Hill to withdraw his plea. The majority opinion found that "gross misinformation" was not involved in this case. *Hill, supra,* at 572. (Petition for Writ of Certiorari, Appendix B-8.) However, the dissenting opinion pointed out that the majority below did not attempt to define gross misconduct or to distinguish the alleged misconduct of Hill's attorney. The dissent argued that the seriousness of the misconduct cannot be calculated by merely figuring the number of years in prison the attorney's mistake cost the defendant. The dissenting opinion points out that in both *Strader, supra,* and in the instant case, neither attorney consulted published law—the statutes applicable to parole. This failure to do minimal research justified labeling the attorney's conduct "gross misconduct." *Hill, supra,* dissent at 574. (Petition for Writ of Certiorari, Appendix B-12.) The petitioner argues that the approach taken by the Eighth Circuit dissenting opinion is the most logical manner to interpret the Fourth Circuit's test of gross misconduct and should be applied in the instant case.

In *United States* v. *Ternullo,* 510 F.2d 844 (2nd Cir. 1975), the United States Court of Appeals for the Second Circuit found that a defendant was entitled to an

evidentiary hearing upon an allegation that his plea was involuntary as a result of the erroneous advice of his attorney as to potential parole eligibility dates. There the defendant had pled guilty to second degree robbery and had received a prison term of five to fifteen years. His attorney advised that it was his understanding that the sentence was from five to fifteen years and that his client would be released on one-third of the minimum sentence with good behavior. The Court stated that the attorney's advice was clearly a misrepresentation of then existing New York law. Applicable New York law passed three years prior to the entry of the plea stated that a defendant sentenced to an indeterminate term would not be eligible for parole until he had served the minimum period fixed by the Court. The Second Circuit found that the prisoner was entitled to an evidentiary hearing to determine whether his plea was rendered without understanding his sentencing possibilities. The Court pointed out that counsel was not being second guessed about a prediction which was proven inaccurate but rather about a statement of an easily accessible fact. The case was remanded.

Easily distinguished from the instant case, *Strader, supra, O'Tuel, supra,* and *Ternullo, supra,* is *United States* v. *Baylin,* 531 F.Supp. 741 (Del. 1982), rev. on other grounds, 696 F.2d 1030 (3rd Cir. 1982), where the Delaware District Court held that any unilateral expectation on a pleading defendant's part as to his likely date of parole, not induced by an "affirmative" misrepresentation (emphasis added), could not provide the basis for challenging a guilty plea. The holding does suggest in dictum that an attorney's advice concerning a guilty plea where inaccurate may state grounds for post conviction relief.

Also distinguishable is *Little* v. *Allsbrook,* 731 F.2d 238 (4th Cir. 1984), relied upon by Respondent. In that case

the defendant did not know what sentence to expect to receive at the time of the entry of his guilty plea. Little's attorney never told him the exact sentence he would receive. Neither the petitioner, the prosecutor, or the defense counsel knew what exact sentence Little would receive at the time of his plea. In *Strader*, *supra*, *O'Tuel*, *supra*, and in the instant case, the defendants knew the sentence to be received, and the controlling parole eligibility law was accessible since it was published and an approximate parole eligibility date could be determined.

Certain state courts have taken positions in conflict with the United States Court of Appeals for the Eighth Circuit in this case. In *People* v. *Owsley*, 66 Ill. App.3d 234, 383 N.E.2d 271 (1978), the Appellate Court of Illinois reviewed the order of a lower court judge summarily dismissing without a hearing a petition for post-conviction relief alleging that the defendant's trial attorney during plea negotiations misrepresented among other things the time the defendant would serve before becoming parole eligible. The appellate court held that it was error to summarily dismiss the petition. The Court held that the trial court should determine whether the allegations in the petition reviewed against the record of the guilty plea hearing were so palpably incredible, patently frivolous, or false as to warrant summary dismissal.

In *Ex parte Young*, 644 S.W.2d 3 (Tex. Cr. App. 1983), the lower court found that the attorney incorrectly informed his client that he would be eligible for parole at three years of two concurrent fifteen year sentences for two aggravated robberies when the client would have been eligible for parole only after five years. (That was an error of two years, compared to three years in the instant case.) In *Ex parte Young*, *supra*, a plea bargain agreement with the prosecutor had been reached and in ex-

change for pleas of guilty the prosecutor agreed to recommend to the trial court that the defendant be sentenced to fifteen years confinement with two sentences running concurrently. The trial court accepted the plea bargain. Petitioner contended that his counsel had misadvised him in that his initial eligibility for parole was two years later than counsel's advised time period. The lower court had made the fact finding that the petitioner's attorney had misadvised petitioner.

The Texas Court of Criminal Appeals held that:

> Although parole eligibility is a collateral consequence of the entry of a plea of guilty and a defendant is not entitled to be informed of parole eligibility by the trial court (citations omitted), if the defendant is grossly misinformed about his parole eligibility date by his attorney, and the defendant relies upon that misinformation to the extent that it induces him to a guilty or a *nolo contendere* plea, his plea may be rendered involuntary. *Ex parte Young*, *supra*, at 4, 5.

Gross misinformation may be distinguished from mere erroneous predictions. In *Lambert* v. *United States*, 392 F. Supp. 113 (N.D.Ga. 1975), the court distinguished counsel's bad judgment call in that indeterminate sentence case from those situations where the correct information was readily obtainable by counsel.

Mr. Hill does not contend nor does he need to reach the constitutional issue of whether the trial court should have inquired as to his understanding of his potential parole eligibility. Rule 24 of the Arkansas Rules of Criminal Procedure does not require such an inquiry nor do the Federal Rules of Criminal Procedure at Rule 11(C)(1). It should be noted that not all courts agree with that approach. Some relevant court cases will be reviewed here to stress the importance state appellate courts have

placed on the relationship between the defendant's understanding of his potential parole eligibility date and the voluntariness of his plea. A California appellate court has held that the failure by the court to advise a defendant of a statute requiring a minimum term for parole eligibility renders a plea involuntary. *People* v. *Tabucchi*, 64 Cal. App.3d 133, 134 Cal. Rptr. 245 (1976). In *Tabucchi*, *supra*, the Defendant was sentenced to a minimum term of five years, and mistakenly believed that he would be parole eligible after serving one-third of the five year term. To his surprise he was not eligible for parole until he had served three years of the minimum term. The appellate court held:

> Recognizing the critical importance to a defendant of the right to parole and recognizing the wide spread knowledge of persons charged with crime concerning the "one-third minimum time" parole policy of the adult authority in usual cases, we believe that notice to a defendant of any statutorily required minimum term for parole eligibility contrary to and of greater duration than the usual adult authority policy based on Penal Code, Section 3049, is constitutionally required as prerequisite to entry of a guilty plea . . . such a minimum term for parole eligibility must be deemed a direct rather than a collateral consequence of the guilty plea.
>
> *Tabucchi*, *supra*, 64 Cal. App.3d at 143, 134 Cal. Rptr. at 251.

The Illinois Supreme Court has held that the trial court's failure to admonish a defendant concerning a mandatory period of parole when accepting his guilty plea is a factor to be considered in determining the voluntariness of the plea. *People* v. *Wills*, 61 Ill.2d 105, 330 N.E.2d 505 (1975), and, see also, *People* v. *Blackburn*, 46 Ill. App.3d 213, 360 N.E.2d 1159 (1977). *Accord*, *Murphy* v. *State*, 663 S.W.2d 604 (Tex. App. 1983), where it was held

that failure to admonish a pleading defendant of probation ineligibility was error.

If the trial court does advise the defendant concerning potential parole eligibility and advises him incorrectly, that may be grounds for setting aside the plea. Several state court appellate decisions address the effect of a trial court judge's misadvice to the defendant concerning his potential parole eligibility at time of sentencing. In *Arizona* v. *Holbert*, 114 Ariz. 244, 560 P.2d 428 (1977), the defendant pled guilty to second degree armed burglary and armed robbery and was sentenced to concurrent terms of not less than forty nor more than sixty years on both counts. The defendant's use of a gun during the commission of the offense rendered him ineligible for parole until serving the minimum term. None of the attorneys present nor the sentencing judge properly explained the consequences of the statute controlling parole eligibility to the defendant. The Court, while inquiring about the defendant's understanding of the plea, stated that the defendant was not eligible for parole until the expiration of five calendar years, a gross mistatement of his parole eligibility. Neither the defense attorney nor the prosecutor corrected the judge. The Arizona court found that the plea was, therefore, not knowingly and intelligently made and that the defendant did not understand the true consequences of his plea. In *Washington* v. *Harvey*, 5 Wash. App. 719, 491 P.2d 660 (1971), the lower court had erroneously advised the defendant that the Board of Prison Terms and Paroles could determine what minimum term might be set where the consecutive terms imposed by the court created a mandatory minimum term. The court's erroneous advice rendered the plea defective.

A prosecuting attorney's erroneous advice to a defendant concerning potential parole eligibility has been held

to render a plea involuntary. In *Allen* v. *Cranor*, 45 Wash.2d 25, 272 P.2d 153 (1954), a prosecuting attorney told the defendant that the parole board could set a minimum term of imprisonment when the law had been amended to deprive the board of that authority. Based on the erroneous advice given by the prosecutor, the guilty plea was set aside and habeas relief was granted.

Mr. Hill also raised in his petition the contention that he was denied effective assistance of counsel as guaranteed by the Sixth Amendment by his appointed attorney's failure to advise him correctly as to his potential parole eligibility date. The test for effective assistance of counsel is found in *Strickland* v. *Washington*, 104 S.Ct. 2052 (1984). In the instant case the United States Court of Appeals for the Eighth Circuit found that "counsel's advice concerning Hill's parole eligibility, even if not wholly accurate, does not amount to constitutionally inadequate performance and is not a dereliction of duty sufficient, by itself, to allow Hill to withdraw his guilty plea." *Hill*, *supra*, at 572. (Petition for Writ of Certiorari, Appendix B.)

While the United States Court of Appeals for the Eighth Circuit is correct in asserting that counsel is not required to perform perfectly, *Strickland*, *supra*, at 2065, indicates that "[C]ounsel . . . has a duty to bear such skill and knowledge as will render the trial a reliable adversarial testing process." The attorneys' affidavits filed with the United States District Court confirming the importance of properly advising clients of their parole eligibility dates should create a factual issue as to whether the adversarial nature of Mr. Hill's trial court appearance was reduced because of gross misinformation provided by his attorney. That misinformation could have been cured by the mere reading of a statute.

After showing that counsel's performance is deficient, *Strickland*, *supra*, at 2064, requires a review of whether counsel's errors were so serious as to deprive the defendant of a fair trial. [i.e. "(the errors of counsel) actually had an adverse effect on the defense." *Strickland*, *supra*, at 2067.] The adverse effect in Mr. Hill's case is obvious in that counsel's alleged errors resulted in a plea and waiver of a trial. At least a factual issue should exist as to whether or not Mr. Hill's appointed attorney acted within the range of competence demanded of attorneys in criminal cases, and to whether any failure to act competently prejudiced the outcome of Mr. Hill's proceeding. The reasonableness of Mr. Hill's attorney's conduct and the likelihood of prejudice is best established at a hearing.

Petitioner's argument herein concerning the effect of erroneous advice directed towards parole eligibility is contra to the position taken by the Second Circuit in *Hunter* v. *Fogg*, 616 F.2d 55 (2nd Cir. 1980), discussed in the Respondent's Brief in Opposition to Petition at p. 5. It should be pointed out, however, that in *Hunter* v. *Fogg*, *supra*, the petitioner stated that the attorney advised him as to what he "might anticipate" as to parole eligibility, but did not promise him a definite eligibility date as is the case herein. The State and the majority opinion of the Eighth Circuit also relied on *United States* v. *Degand*, 614 F.2d 176 (8th Cir. 1980). That case does not deal with potential parole eligibility advice but rather misadvice by counsel concerning concurrent or consecutive sentencing. At sentencing, Degand's attorney expressed his "hope that your action, your Honor, would make it possible that we might combine timewise the imprisonment in Illinois and the federal punishment at the hands of the federal government in this case." *Degand*, *supra*, at 178. As pointed out by the dissenting opinion in the Eighth Circuit any advice that Degand's attorney gave him was

based on hope of leniency rather than a misreading of the law as is the case herein. *Hill*, *supra*, dissent at 574. (Petition for Writ of Habeas Corpus, Appendix B-11.) As pointed out by the dissent, nothing said at Hill's plea hearing would have alerted him to his attorney's legal error and the Court did not address parole eligibility until after accepting the plea. Even then, the Court reinforced the attorney's error by stating Hill would have to serve "at least one-third of his sentence." *Hill*, *supra*, at 178. (Petition for Writ of Certiorari, Appendix B-11.)

Respondent also argues that no evidentiary hearing is needed since the sentencing hearing reflected in the Pulaski County Circuit Court record (J.A. 66) indicates petitioner was aware of his rights at the proceeding. The State argues in effect that the transcript below creates an irrebuttable presumption of voluntariness on the issue raised herein. The petitioner is not precluded from challenging the voluntariness of his plea because of the transcript below. The State submits that a high burden is placed on the petitioner to demonstrate extraordinary circumstances to gain a hearing in light of an existing record which would seem to indicate voluntariness. *Blackledge* v. *Allison*, 431 U.S. 63 (1977), and *Pennington* v. *Housewright*, 666 F.2d 329 (8th Cir. 1981). The fact that upon entering a plea the defendant assures a court that no one has promised him anything is not conclusive. For example, the Ninth Circuit has noted in *United States* v. *Tweedy*, 419 F.2d 192, 193 (9th Cir. 1969), that the defendant might have felt that it was all part of the game and that honest answers would destroy the deal. *See also*, *Christy* v. *United States*, 437 F.2d 54 at 55 (9th Cir. 1971) and *State* v. *Lamas*, 136 Ariz. 349, 666 P.2d 94 (1983).

A statement in the Eighth Circuit's decision in this case

should be addressed herein. In the majority opinion the Court stated:

> Further reasons articulated by the district court make it undesirable that claimed misadvice on parole eligibility render the plea involuntary. The petitioner's behavior and legislative and administrative changes in parole eligibility rules may affect this date. Every plea bargaining arrangement thus would be subject to reopening any time a defendant did not become eligible for parole at the time estimated. We do not believe that the Constitution requires this conclusion. (Petition for Writ of Certiorari, Appendix B-7.) *Hill*, *supra*, at 572.

It is true that the petitioner's behavior as it relates to the accrual of good time may affect his potential parole eligibility date. However, that is a matter solely within the petitioner's control and has nothing to do with the advice received from counsel. As to legislative and administrative changes, it is the policy of the Arkansas Department of Corrections and the Arkansas Legislature to continue the parole eligibility law in effect at the time of the defendant's plea throughout his incarceration. *See*, Ark. Stat. Ann. § 43-2829 (Cum. Supp. 1983) and Ark. Stat. Ann. § 43-2830.5 (Cum. Supp. 1983). Specifically Ark. Stat. Ann. § 43-2830.5 (Cum. Supp. 1983) states that nothing in the Act addressing the parole eligibility of persons committing certain felonies after April 1, 1983, is construed to repeal the parole eligibility laws in effect on the date of criminal offenses committed prior to that time. Petitioner submits that there are no legislative or administrative changes that have affected his parole eligibility date. If there are alleged administrative changes that may have affected that date, then that matter is best addressed at the evidentiary hearing requested by petitioner.

Finally, petitioner contends that a reversal and remand for an evidentiary hearing in this case would not set a precedent to be abused by those incarcerated from guilty pleas or establish a basis for reopening every plea bargaining arrangement. (Petition for Writ of Certiorari, Appendix A-12.) The remand for a hearing in this case will establish precedent only for allowing a hearing on an allegation of affirmative misadvice concerning parole eligibility resulting from the attorney's failure to read published statutes. The precedent here will be similar to that in *Strader, supra*. If the District Courts of the Fourth Circuit had been inundated with habeas petitions following *Strader, supra*, surely that result would have been reflected in the *O'Tuel, supra*, opinion four years later.

CONCLUSION

For the reasons stated above, the petitioner requests that the United States Supreme Court reverse the holding of the United States Court of Appeals for the Eighth Circuit and remand this matter to the United States District Court for the Eastern District of Arkansas, Western Division, for an evidentiary hearing in this matter.

Respectfully submitted,

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No. 84-1103 (3)

In the Supreme Court of the United States

October Term, 1984

William Lloyd Hill ..... *Petitioner*

V.

A. L. Lockhart, Director,
Arkansas Department of Correction ..... *Respondent*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENT

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QUESTION PRESENTED FOR REVIEW

WHETHER A STATE PRISONER IS ENTITLED TO AN EVIDENTIARY HEARING IN UNITED STATES DISTRICT COURT HABEAS CORPUS PROCEEDING WHERE THE PRISONER HAD PLEADED IN HIS PETITION THAT HIS STATE COURT NEGOTIATED GUILTY PLEA WAS INVOLUNTARY AND RESULTED FROM INEFFECTIVE REPRESENTATION OF COUNSEL IN THAT HIS ATTORNEY MISADVISED HIM AS TO HIS POTENTIAL PAROLE ELIGIBILITY DATE AND AS A RESULT OF THAT ADVICE THE PRISONER ACCEPTED THE PLEA OFFER AND ENTERED THE GUILTY PLEA?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: Page

STATUTES AND RULES:

MISCELLANEOUS:

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ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENT

STATEMENT OF THE CASE

In case No. CR-78-1922, filed in Pulaski County Circuit Court, State of Arkansas, petitioner was charged with murder in the first degree, Count I and theft of property, Count II. (Joint Appendix 66). On April 6, 1979, petitioner, with the advice of counsel, executed a Plea Statement indicating he wished to plead guilty. (Joint Appendix 28-29). On that same date, petitioner appeared in open court, accompanied by defense counsel, for the purpose of entering a plea of guilty. Pursuant to a negotiated sentence recommended by the State, petitioner entered a plea of guilty, with recommended terms of 35 years imprisonment on the first degree murder charge and 10 years imprisonment on

the theft of property charge, said terms to run concurrently. The state circuit court accepted petitioner's plea and the State's recommendation and sentenced petitioner accordingly. The state circuit court advised petitioner he would have to serve at least one-third of his sentence before becoming eligible for parole. (Joint Appendix 66-70).

Thereafter, petitioner sought state post-conviction relief on the grounds that his guilty plea was involuntary because sentence was imposed in violation of the plea bargain. That motion was denied by the Pulaski County Circuit Court October 21, 1980. (Joint Appendix 13).

Pursuant to 28 U.S.C. §2254 petitioner filed a Petition for Writ of Habeas Corpus in federal district court June 30, 1981. (Joint Appendix 3-11). As stated by the district court, petitioner contended his guilty plea was involuntary and that defense counsel had been ineffective because he had not accurately advised petitioner regarding his parole eligibility. (Petition for Writ of Certiorari, Appendix A-1). Specifically, petitioner contended he had been advised he would be eligible for parole after serving one-third his sentence. As a second offender, however, he is not eligible for parole until serving one-half his time.

The district court denied relief without an evidentiary hearing. (Opinion reproduced in Petition for Writ of Certiorari, Appendix A). The Court of Appeals for the Eighth Circuit affirmed that decision and likewise denied rehearing en banc. (Opinions reproduced in Petition for Writ of Certiorari, Appendix B, C).

The basis for the decision below was that, based on the state court record of the plea hearing, petitioner's parole eligibility was not part of the bargain when petitioner entered his guilty plea, nor was it a consideration on which he relied when entering his plea. It was further held that parole eligibility is a collateral, not a direct consequence of a guilty plea on which petitioner need not be informed. Thus,

any alleged misadvice on that issue does not render petitioner's plea involuntary nor defense counsel ineffective.

On March 18, 1985, the United States Supreme Court granted review of this case by Writ of Certiorari.

SUMMARY OF THE ARGUMENT

This Court has held that the hearing at which a criminal defendant enters a plea of guilty must show that the plea was entered voluntarily and knowingly. A plea of guilty is itself a conviction and nothing remains except to give judgment and determine punishment. *Boykin v. Alabama*, 395 U.S. 238 (1969). When a defendant seeks to set aside a plea of guilty, the focus is on the voluntariness of the plea itself and the advice rendered by counsel. This Court has previously held that an attorney's advice to a defendant who enters a plea is not assessed in retrospect but rather, is examined as whether it is within the range of competence demanded of attorneys in criminal cases. *McMann v. Richardson*, 397 U.S. 759 (1970).

The plea bargaining process is established in our criminal justice system. For that process to have its greatest potential for disposing of criminal cases, criminal convictions must be accorded finality. Thus the record of a guilty plea is accorded a presumption of verity and correctness. *Blackledge v. Allison*, 431 U.S. 63 (1977).

Petitioner herein was charged with theft of property and murder in the first degree in an Arkansas state court. He pleaded guilty and was sentenced to 35 years imprisonment, pursuant to a sentence recommended by the State prosecutor. Petitioner entered his plea in open court after executing a plea statement and the sentence recommendation, though not binding on the trial court, was accepted and sentence entered accordingly. In a subsequent habeas corpus petition (28 U.S.C. §2254), petitioner sought to set aside his plea contending that the plea agreement included his eligibility for parole after serving one-third his sentence and that defense counsel had misadvised him regarding this issue. Under Arkansas law, petitioner, as a second offender, is not eligible for parole until he has served one-half his prison sentence.

The district court and the Eighth Circuit Court of Appeals denied relief without an evidentiary hearing. Respondent asserts that the correct result has been reached in this case.

Generally, parole eligibility is not a direct, but rather a collateral, consequence of a guilty plea. It is unnecessary to advise a defendant who desires to plead guilty as to his parole eligibility. If a defendant is misadvised on that issue, his guilty plea is not rendered involuntary. Here, on the basis of the state court record, parole eligibility was not part of the plea bargain. Thus, petitioner was not wrongfully induced to plead guilty. Moreover, the plea bargain here was not binding on the state court under Arkansas law. Petitioner, therefore, did not know until his plea was accepted by the state court what sentence would be imposed. Any indications by defense counsel regarding parole eligibility amount to no more than an estimate regarding the sentence that might be imposed. Petitioner's expectation here was based on his subjective belief of what his sentence would be, coupled with a hope for leniency. Petitioner was not entitled to an evidentiary hearing since the issues raised can be decided on the strength of the state court record of his plea hearing.

Even if counsel erred in his advice on a statutory provision, counsel is not rendered ineffective per se, nor has petitioner been prejudiced. If this Court has not extended the prejudice component to collateral attacks on judgments the basis of which are guilty pleas, it is strongly urged to do so in this case. *Strickland v. Washington*, ____ U.S. ____, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). As previously argued, petitioner here did not rely on counsel's advice regarding parole eligibility in entering his plea of guilty. Moreover, a convicted person does not have a constitutional right to be released on parole in Arkansas. The possibility of parole provides an inmate with nothing more than the mere hope that the benefit will be obtained. *Greenholtz v. Inmates of Nebraska Penal & Cor.*, 442 U.S. 1 (1979).

Petitioner here bargained for 35 years imprisonment and that is the sentence that was imposed. Whether petitioner is eligible for parole after serving one-third or one-half of that term, he still must serve the sentence reflected in the judgment. The denial of parole merely requires the petitioner to serve out the length of his sentence.

Criminal convictions must have finality. That principle is strongest when applied to collateral attacks on judgments in criminal cases. The court below properly denied petitioner habeas relief, without an evidentiary hearing. The judgment of the Eighth Circuit Court of Appeals should be affirmed.

ARGUMENT

I.

In case No. CR-78-1922, filed in Pulaski County Circuit Court, State of Arkansas, petitioner was charged with murder in the first degree, Count I and theft of property, Count II. (Joint Appendix 66). On April 6, 1979, petitioner, with the advice of counsel, executed a Plea Statement which indicated he voluntarily pleaded guilty because he was guilty as charged. (Joint Appendix 28-29). On that same date, petitioner appeared in open court, accompanied by defense counsel, and entered a negotiated plea of guilty to the charges. He was sentenced to a 35 year term of imprisonment on the charge of first degree murder and a term of 10 years imprisonment on the charge of theft of property, said sentences to run concurrently.[1] After accepting petitioner's guilty plea and imposing sentence, the circuit court stated petitioner would be required to serve at least one-third of his sentence before becoming eligible for parole. (Joint Appendix 69-70).

Thereafter, petitioner sought state post-conviction relief on the grounds that his guilty plea was involuntary because sentence was imposed in violation of a negotiated plea bargain. That motion was denied by the Pulaski County Circuit Court October 21, 1980. (Petition for Writ of Certiorari, Appendix A 1-2; Joint Appendix 13).

Pursuant to 28 U.S.C. §2254, petitioner filed a Petition for Writ of Habeas Corpus in federal district court on June 30, 1981. (Joint Appendix 3-11). As stated by the district court, petitioner contended therein that his guilty plea was

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1 The State court record of the plea hearing reflects sentence imposed at two years on the theft of property charge. (Joint Appendix 69). The district court below viewed this as either a misstatement or typographical error, and noted that issue had not been raised by petitioner. (Petition for Writ of Certiorari, Appendix A 3)

involuntary as indicated above; that defense counsel was ineffective because he had not accurately advised petitioner regarding his parole eligibility; and that he was denied due process during his appeal of the court's denial of his motion to withdraw his plea. (Petition for Writ of Certiorari, Appendix A-1). The district court denied relief o all three grounds without an evidentiary hearing. (Opinion reproduced in Petition for Writ of Certiorari, Appendix A 1-13). The Court of Appeals for the Eighth Circuit affirmed that decision and likewise denied rehearing en banc. (Opinions reproduced in Petition for Writ of Certiorari, Appendix B 1-12; Appendix C 1).

The issue before the Supreme Court on grant of certiorari concerns petitioner's allegation that defense counsel misadvised him regarding his earliest parole eligibility date. Petitioner contends counsel advised that he would be eligible for parole after serving one-third of his sentence. Pursuant to Ark. Stat. Ann. §43-2829B. (3) (Repl. 1977) petitioner, as a second offender was not, at the time he entered his guilty plea, eligible for parole until serving one-half of the sentence imposed, with credit for good time allowances. In contrast, inmates classified as first offenders, except those under 21 years of age, are eligible for parole after serving a minimum of one-third their sentence, with credit for good time. Ark. Stat. Ann. §43-2829B. (2) (Repl. 1977). Petitioner contends defense counsel's advice renders his guilty plea involuntary. He also contends that counsel himself was ineffective in rendering this advice, thereby violating petitioner's rights under the Sixth Amendment.

Initially, respondent notes that petitioner's characterization in his brief on the merits that respondent admits petitioner was misinformed regarding parole eligibility both by defense counsel and the circuit court is in need of clarification.

The district court and the Eighth Circuit Court of Appeals denied relief to petitioner without an evidentiary

hearing. In doing so, it appears to respondent that their respective conclusions were based on petitioner's allegations, if true, as well as the conclusiveness of the state court record at the guilty plea hearing. [2] Dismissal of a habeas corpus petition is proper without a hearing where allegations, if true, fail to state a claim cognizable in a federal habeas corpus proceeding. *Linder v. Wyrick*, 644 F.2d 724 (8th Cir. 1981), citing *Parton v. Wyrick*, 614 F.2d 154 (8th Cir. 1980) cert. denied, 449 U.S. 846 (1980). Dismissal is also proper where the facts are not in dispute or where any dispute can be resolved on the basis of the existing state court record. *Linder v. Wyrick, supra.* The Supreme Court has indicated that a petitioner in a habeas corpus action may be entitled to an evidentiary hearing where the petition sets out detailed factual allegations which are not vague and indicate specifics of who, when, where, etc. *Blackledge v. Allison*, 431 U.S. 63 (1977); *Machibroda v. United States*, 368 U.S. 487 (1962).

Respondent is aware of no fact, in the record, outside of petitioner's allegation in his habeas petition which would support an admission that defense counsel misadvised petitioner regarding his eligibility for parole and does not

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The district court concluded that "even if petitioner [had been] misled by predictions of counsel or statements of the sentencing judge," regarding parole eligibility, that issue "is not such a consequence of his guilty plea that such misinformation renders his plea involuntary." (Petition for Writ of Certiorari, Appendix A 8). The district court further concluded that the fact that defense counsel may have misadvised petitioner, or gave advice which was not totally accurate, such advice does not render counsel's performance constitutionally inadequate. (Petition for Writ of Certiorari, Appendix A 10). In contrast, the district court observed that the circuit court was "entirely correct" in stating that petitioner would have to serve at least one-third of his sentence before becoming eligible for parole. (Petition for Writ of Certiorari, Appendix A 11).

The Court of Appeals concluded that even if counsel's advice was not wholly accurate, petitioner would not be entitled to withdraw his guilty plea. (Petition for Writ of Certiorari, Appendix B 8).

concede the same. The record of the guilty plea hearing reflects the statement to petitioner by the state circuit court. The tenor of respondent's response to the petition for writ of certiorari is that, assuming *arguendo*, the truth of petitioner's allegations, petitioner is entitled to no relief because parole eligibility was not part of the bargain as reflected by the guilty plea hearing and the issues can be resolved on the basis of that hearing. Further, parole eligibility is a collateral consequence of a guilty plea and any alleged misadvice thereon does not render the plea involuntary. Petitioner is cognizant of respondent's position since petitioner asserts that remand of this case would establish a procedure of allowing a hearing regarding an allegation of an attorney's affirmative misadvice concerning parole eligibility. See, petitioner's brief on the merits, p. 18. Thus, the truth of petitioner's factual allegations in his habeas petition is not admitted here.

II.

Recognizing the waiver of federal constitutional rights that take place when a defendant enters a plea of guilty, the Supreme Court held in *Boykin v. Alabama*, 395 U.S. 238 (1969) that the record of the hearing must affirmatively show that the plea was entered voluntarily and knowingly. A plea of guilty is itself a conviction since nothing remains except to give judgment and determine punishment. *Id.* at 242.

Later, in what has become known as the *Brady* trilogy, the allegation of several defendants that their guilty pleas should be set aside, absent clear evidence of coercion, without more, did not entitled them to withdrawal of their respective pleas. *Brady v. United States*, 397 U.S. 742 (1970) (fear of death penalty did not render plea involuntary). "A defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action." *Id.* at 757. In *Parker v. North Carolina*, 397 U.S.

790 (1970), the Court looked to determine if the plea was intelligently entered and concluded that, even if defense counsel mistakenly thought the defendant's confession was admissible, the plea would not be set aside as long as the advice of counsel was within the range of competence. Finally, in *McMann v. Richardson*, 397 U.S. 759 (1970) defendants who alleged their guilty pleas were entered because of alleged coerced confessions, without more, were not entitled to a habeas corpus hearing. In that case, the Court indicated that whether a guilty plea was intelligently entered does not mean that defense counsel's advice must withstand retrospective examination in a post-conviction hearing. Rather, an attorney's advice is assessed in the context of whether it is within the range of competence demanded of attorneys in criminal cases. The defendant who desires to plead guilty assumes the risk of ordinary error in his attorney's assessment of the law and the facts. *Id.* at 770-771.

The Supreme Court has recognized that the plea bargaining process is an important component of the criminal justice system. *Brady v. United States*, 397 U.S. 742 (1970); *Boykin v. Alabama*, 395 U.S. 238 (1969); *Blackledge v. Allison*, 431 U.S. 63 (1977). Although there is no constitutional right to a plea bargain, *Weatherford v. Bursey*, 429 U.S. 545 (1977) the plea bargaining process, properly administered, is to be encouraged due to the desirable benefits that flow to the defendant, the criminal justice system and society at large. *Santobello v. New York*, 404 U.S. 257 (1971). [3] For the process to be credibly utilized,

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In *Santobello v. New York*, 404 U.S. 257, 261 (1971) the desirable benefits of plea bargaining were discussed as follows:

> "It leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pretrial confinement for those who are denied release pending trial; it protects the public from those accused persons who are prone to continue criminal conduct even while on pretrial release; and, by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned." See, *Brady v. United States*, 397 U.S. 742, 751-752 (1970).

criminal cases the disposition of which rests on the entry of guilty pleas in open court must be "accorded a great measure of finality." [4] *Blackledge v. Allison*, 431 U.S. 63, 71 (1977). Although a habeas petitioner, by pleading detailed factual allegations, may be entitled to an evidentiary hearing, the record of a guilty plea declared in open court

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The Court expressed its views toward finality of disposition in *Blackledge v. Allison*, 431 U.S. 63, 71-72 (1977) as follows:

> "To allow indiscriminate hearings in federal postconviction proceedings, whether for federal prisoners under 28 U.S.C. §2255 or state prisoners under 28 U.S.C. §§2241-2254, would eliminate the chief virtues of the plea system—speed, economy, and finality. And there is reason for concern about the prospect. More often than not a prisoner has everything to gain and nothing to lose from filing a collateral attack upon his guilty plea. If he succeeds in vacating the judgment of conviction, retrial may be difficult. If he convinces a court that his plea was induced by an advantageous plea agreement that was violated, he may obtain the benefits of its terms. A collateral attack may also be inspired by 'a mere desire to be freed temporarily from the confines of the prison.' " Citing *Price v. Johnston*, 334 U.S. 266, 284-285; accord *Machibroda v. United States*, 368 U.S. 487, 497 (Clark, J. dissenting).

In the United States District Courts, out of a total of 35,391 defendants convicted and sentenced, 29,814 pleaded guilty and 709 entered pleas of nolo contendere. Source: Detailed Statistical Tables, Annual Report of the Director of the Administration Office of the United States Court for the twelve month period ending June 30, 1983.

In the United States District Courts, figures for the fiscal year 1977 reflect that 36,505 defendants were convicted and sentenced. Of those, 31,112 entered pleas of guilty or nolo contendere.

In the United States District Courts, figures for the fiscal year 1978 reflect that 32,913 defendants were convicted and sentenced. Of those 27,295 entered pleas of guilty or nolo contendere.

Source: Annual Report of the Director of the Administrative Office of the United States Courts, 1970-79, Criminal Statistical Tables, Table D-7.

carries "a strong presumption of verity." *Id.* at 74. As observed by this Court in *Strickland v. Washington*, ____ U.S. ____, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) "the presumption that a criminal judgment is final is at its strongest in collateral attacks on that judgment." *Id.*, 104 S.Ct. at 2070, 80 L.Ed.2d at 700. The Court of Appeals for the Eighth Circuit has recognized that the procedures utilized in Arkansas state courts are sufficient to show voluntariness of the guilty plea and "are closer to those requiring a hearing 'only in the most extraordinary circumstances.' " *Pennington v. Housewright*, 666 F.2d 329, 331, 332 (8th Cir. 1982), cert. denied 102 S.Ct. 1775 (1982). [5]

III.

Against this background, the district court and the Eighth Circuit Court of Appeals denied petitioner's request to withdraw his guilty plea, without an evidentiary hearing. Both Courts concluded that petitioner's parole eligibility was not a part of the bargain when petitioner entered his plea of guilty, nor was it a consideration in petitioner's decision to plead guilty. The basis for this determination was the transcript of the hearing wherein petitioner entered his respective guilty pleas. As noted by the district court below, petitioner affirmed to the state trial court at the hearing that the terms of the plea agreement with the State included periods of incarceration of 35 and 10 years respectively. The state court thereupon entered judgment and sentenced petitioner accordingly. Specifically, in denying relief without an evidentiary hearing, the district court and

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Pursuant to Arkansas Rules of Criminal Procedure 24.4, 24.5, 24.6, 24.7, Ark. Stat. Ann. Vol. 4A (Repl. 1977) procedures which must be followed when accepting a defendant's plea of guilty are set forth as follows:

> RULE 24.4 Advice by Court.

The court shall not accept a plea of guilty or nolo contendere from a defendant without first addressing the defendant personally, informing him of and determining that he understands:

(a) the nature of the charge;

(b) the mandatory minimum sentence, if any, on the charge;

(c) the maximum possible sentence on the charge, including that possible from consecutive sentences;

(d) that if the offense charged is one for which a different or additional punishment is authorized because the defendant has previously been convicted of an offense or offenses one (1) or more times, the previous conviction or convictions may be established after the entry of his plea in the present action, thereby subjecting him to such different or additional punishment; and

(e) that if he pleads guilty or nolo contendere he waives his right to a trial by jury and the right to be confronted with the witnesses against him, except in capital cases where the death penalty is sought.

RULE 24.5 Determining Voluntariness of Plea.

The court shall not accept a plea of guilty or nolo contendere without first determining that the plea is voluntary. The court shall determine whether the tendered plea is the result of a plea agreement. If it is, the court shall require that the agreement be stated. The court shall also address the defendant personally and determine whether any force or threats, or any promises apart from a plea agreement, were used to induce the plea.

RULE 24.6 Determining Accuracy of Plea.

The court shall not enter a judgment upon a plea of guilty or nolo contendere without making such inquiry as will establish that there is a factual basis for the plea.

RULE 24.7 Record of Proceedings.

The court shall cause a verbatim record of the proceedings at which a defendant enters a plea of guilty or nolo contendere to be made and preserved.

the Court of Appeals held (1) parole eligibility is a collateral, not a direct consequence of a guilty plea and alleged misinformation thereon does not render a defendant's plea involuntary, especially when it is not part of the plea bargain; and (2) it is unnecessary to communicate parole eligibility requirements to a defendant who desires to plead guilty and thus, defense counsel's alleged erroneous advice thereon does not render counsel ineffective.

In reaching its conclusion, the Eighth Circuit Court of Appeals relied upon a previous decision it had rendered, *United States v. DeGand*, 614 F.2d 176 (8th Cir. 1980). DeGand claimed that he had not pleaded guilty with full knowledge of the consequences because the district court failed to inform him that his federal sentence might not run concurrently with his state sentence. The sentencing record indicated that DeGand had been fully advised of his rights. Defense counsel had advised DeGand that he "hoped" the sentence would run concurrently. In denying relief, the Eighth Circuit stated that the " . . . erroneous advice of counsel as to the penalty which may be imposed does not, by itself, lead to manifest injustice sufficient to allow a defendant to withdraw his guilty plea." *DeGand*, 614 F.2d at 178. Though not relied upon by the Court below, see also, *Barbee v. Ruth*, 678 F.2d 634 (5th Cir. 1982) cert. denied, 103 S.Ct. 149 (1982) (defendant understood length of sentence he might possibly receive and thus was fully aware of the plea's consequences; plea not involuntary because defendant not advised of effect a consecutive life sentence would have on parole eligibility).

The district court and the Eighth Circuit decisions also relied upon *Hunter v. Fogg*, 616 F.2d 55 (2d Cir. 1980). The petitioner there sought habeas corpus relief claiming the court, the prosecutor and defense counsel had misled him regarding his guilty plea because he had been misinformed about his parole eligibility date. The defense attorney there advised petitioner what he "might anticipate" as to parole eligibility but did not promise a definite sentence. Although

accepting petitioner's claim he had been misinformed, the Second Circuit stated that "[t]he voluntariness of a guilty plea is not undermined by a lack of explanation as to the mechanics of a parole system." *Hunter* 616 F.2d at 61.

Generally, a defendant need not be informed regarding parole eligibility because that matter is not a direct consequence of his guilty plea. *Bell v. North Carolina*, 576 F.2d 564 (4th Cir. 1978) cert. denied, 439 U.S. 956 (1978), (defendant sought to set aside guilty plea because he was not advised that, as a recipient of a life sentence, he would not be eligible for parole for twenty years; consequences which must be understood are those that flow from plea; potential parole eligibility, absent special limitations, is not a direct incident to a guilty plea and need not be previously communicated to a defendant; failure to inform defendant does not render plea involuntary); *United States v. Garcia*, 698 F.2d 31 (1st Cir. 1983) (defendant sought to set aside plea entered in federal court on grounds she was not advised of certain factors affecting her parole eligibility; nothing in principles of due process require advice omitted here nor renders plea unintelligent or involuntary; absent showing defendant was unaware of actual statutory sentencing possibilities or that omitted information would have made any difference, relief denied); *Trujillo v. United States*, 377 F.2d 266 (5th Cir. 1967), quoting with approval *Smith v. United States*, 324 F.2d 436, 441 (D.C. Cir. 1963) (eligibility for parole is not a consequence of a plea of guilty, but a matter of legislative grace); *Roberts v. United States*, 491 F.2d 1236, 1238 (3d Cir. 1974); *Hunter v. Fogg*, 616 F.2d at 61 (2d Cir. 1980); *Strader v. Garrison*, 611 F.2d 61, 65 (4th Cir. 1979). This general principle also applies in Arkansas. *Carter v. State*, 283 Ark. 23, 670 S.W.2d 439 (1984) (Matter of parole lies solely within control of Department of Correction and it would be sheer speculation for attorney or court to advise defendant regarding percentage of time to be

served). See also, *Deason v. State*, 263 Ark. 56, 61, 562 S.W.2d 79 (1978). [6]

As noted by the Eighth Circuit Court of Appeals in its opinion, federal courts, pursuant to a 1974 amendment to Federal Rules of Criminal Procedure 11, no longer are required to inform a defendant at the plea hearing as to parole eligibility. (Petition for Writ of Certiorari, Appendix B 4, n.2). In *United Staes v. Timmreck*, 441 U.S. 780 (1979) a technical violation of Federal Rules of Criminal Procedure 11, to-wit, the district judge's failure to explain the mandatory parole provision to a defendant at the hearing on his plea of guilty, did not support a collateral attack on the plea itself. It was concluded that the claimed error did not cause a complete miscarriage of justice nor result in proceedings inconsistent with the rudimentary demands of fair procedure. Respondent notes the defendant there did not argue that he was unaware of the mandatory parole term or, had he been properly advised, he would not have pleaded guilty. Significant, however, is the Court's

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See also, *Bryant v. Cherry*, 687 F.2d 48 (4th Cir. 1982), cert. denied 103 S.Ct. 497 (1982) (defendant sought to set aside plea of guilty to two consecutive life sentences because not informed of 7 year mandatory minimum sentence for armed robbery; held that defendant's ineligibility for parole is not a direct consequence of his guilty plea because he could not reasonably have expected to receive a more favorable parole eligibility); *McIntosh v. State*, 627 S.W.2d 652 (Mo. App. 1981) (record of plea hearing established plea voluntarily entered; changes in parole laws were collateral consequences of plea and counsel's failure to inform defendant not enough to vitiate plea); *United States v. Garcia*, 636 F.2d 122 (5th Cir. 1981) (defendant informed of penalties but no constitutional requirement for explanation of parole or probation possibilities).

Collateral consequences of a guilty plea include: *United States v. Crowley*, 529 F.2d 1066 (3d Cir. 1976), cert. denied, 425 U.S. 995 (1976) (loss of civil service job); *Cuthrell v. Director, Patuxent Institution*, 475 F.2d 1364 (4th Cir. 1973), cert. denied, 414 U.S. 1005 (1975) (nature of institution to which defendant is sent); *Meaton v. United States*, 328 F.2d 379 (5th Cir. 1964), cert. denied, 380 U.S. 916 (1965) (loss of rights to vote and travel abroad).

expressed concern with finality as served by the limitation on collateral attack which has special force on convictions based on guilty pleas. *Id.* at 784.[7]

Since it is unnecessary for a defendant to be informed regarding parole eligibility, it has followed that erroneous advice on that issue is not grounds on which a guilty plea may be vacated. *Brown v. Perini*, 718 F.2d 784 (6th Cir. 1983); *Little v. Allsbrook*, 731 F.2d 238 (4th Cir. 1984), discussed, *infra;* and *Hunter v. Fogg*, 616 F.2d 55 (2d Cir. 1980), discussed, *supra.*

In *Brown v. Perini*, 718 F.2d 784 (6th Cir. 1983) the Sixth Circuit denied habeas relief to Brown who sought to set aside his guilty plea on the grounds he had been affirmatively misinformed regarding his parole eligibility date. Brown agreed to plead guilty on two counts of aggravated murder aware of state's evidence going to his identity as the perpetrator of the crimes and the possibility of receiving the death penalty. During plea negotiations, there was some confusion regarding parole eligibility because of recent revisions in Ohio's penal code. Defense counsel advised Brown that parole eligibility for aggravated murder was ten years but that his colleagues believed the fifteen year eligibility requirement was applicable. The trial

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Quoting *United States v. Smith*, 440 F.2d 521, 528-529 [(7th Cir. 1971)] (Stevens, J., dissenting) the Court concluded its opinion by stating:

> 'Every inroad on the concept of finality undermines confidence in the integrity of our procedures; and, by, increasing the volume of judicial work, inevitably delays and impairs the orderly administration of justice. The impact is greatest when new grounds for setting aside guilty pleas are approved because the vast majority of criminal convictions result from such pleas. Moreover, the concern that unfair procedures may have resulted in the conviction of an innocent defendant is only rarely raised by a petition to set aside a guilty plea.'

United States v. Timmreck, 441 U.S. at 784.

judge, off-the-record, expressed the opinion that Brown would be eligible for parole in ten years. After pleading guilty and being sentenced, Brown was subsequently advised by prison authorities he would not be eligible for parole until he had served fifteen years.

Although a magistrate's evidentiary hearing was held on Brown's habeas petition, the district court rejected the magistrate's finding that Brown's guilty plea was premised on his belief that he would be eligible for parole in ten years, and denied relief. On appeal the Sixth Circuit assessed the issue as whether Brown's plea was a voluntary and intelligent choice and focused its analysis on the state court record of the plea hearing. The Court of Appeals concluded the plea was entered attendant with the necessary constitutional safeguards and that misinformation concerning the collateral consequences of Brown's plea was not a violation of due process which would render the plea involuntary.

Of course, petitioner's argument advanced in his brief is to the contrary, as supported by cited caselaw. See, e.g., *People v. Tabucchi*, 64 Cal. App. 3d 133, 134 Cal. Rptr. 245 (1976); *People v. Willis*, 61 Ill.2d 105, 330 N.E.2d 505 (1975); *Murphy v. State*, 663 S.W.2d 604 (Tex. App. 1983); *Arizona v. Holbert*, 114 Ariz. 244, 560 P.2d 428 (1977); *Washington v. Harmony*, 5 Wash. App. 719, 491 P.2d 660 (1971). Petitioner, as well as the dissenting opinion to the decision rendered below, rely on *Strader v. Garrison*, *supra*, in support of their respective positions that a guilty plea should be vacated in such cases. The basis for that position is that a defendant, having pleaded guilty upon erroneous advice regarding parole eligibility, has not been fully informed of the consequences of his plea. Furthermore, defense counsel who misinforms a defendant has not been effective in his representation and thus, the defendant has been denied his right to competent counsel.

Strader, and a companion case, *O'Tuel v. Osborne*, 706 F.2d 498 (4th Cir. 1983) are distinguishable from the circumstances of the instant case. In both cases there was a finding that the petitioner's guilty plea was induced by misadvice of defense counsel regarding parole eligibility.

The *Strader* Court stated:

> Here, though parole eligibility dates are collateral consequences of the entry of a guilty plea of which a defendant need not be informed if he does not inquire, when he is grossly misinformed about it by his lawyer, and relies upon that misinformation, he is deprived of his constitutional right to counsel. When the erroneous advice induces the plea, permitting him to start over again is the imperative remedy for the constitutional deprivation. 611 F.2d at 65.

That *Strader* and *O'Tuel* are not controlling is indicated by a later decision rendered by the Fourth Circuit Court of Appeals, *Little v. Allsbrook*, 731 F.2d 238 (4th Cir. 1984). In the *Little* case, petitioner entered a negotiated plea to second degree murder and was sentenced to 25 to 30 years imprisonment. Little testified at his subsequent habeas corpus hearing that defense counsel told him the "deal worked out" was that Little could make parole in five years. Defense counsel denied making any promise to Little regarding the sentence he would receive and told petitioner he would be eligible for parole after serving one-fifth of his maximum sentence, but no maximum sentence had been set as yet.

The district court granted habeas corpus relief because of defense counsel's gross misinformation regarding parole possibilities, relying on *Strader* and *O'Tuel*. In reversing the district court and holding those cases inapplicable, the Fourth Circuit noted that neither petitioner nor defense counsel knew what sentence would be imposed. *Little v. Allsbrook*, 731 F.2d at 241.

Thus, defense counsel's advice merely amounted to an erroneous sentence estimate and Little's erroneous expectation based on that estimate did not render his subsequent plea involuntary. Since Little had never been specifically assured of what his sentence would be, he could not have been "grossly misinformed" about his parole eligibility. The Fourth Circuit recognized that permitting Little to vitiate his plea because of his purported expectation

> would open the door to habeas relief for all prisoners whose lawyers underestimated the length of their sentences. Such a holding would seriously undermine the finality of judgments entered pursuant to plea bargains. *Little v. Allsbrook*, 731 F.2d at 242.

Turning to the facts of the case at hand, petitioner executed a plea statement prior to entry on the record of his guilty plea. In that statement, petitioner expressed his understanding of the following essential factors pursuant to the waiver of rights inherent in entering a plea of guilty: (a) the minimum and maximum sentence that could be imposed; (b) waiver of right to trial by jury and right to appeal; (c) what he was charged with having done; (d) that he had discussed his case fully with his attorney and was satisfied with his services; (e) that his plea of guilty was not induced by any force, threat or promise apart from the plea agreement; and (f) the judge was not required to carry out any understanding between petitioner, his attorney, the prosecuting attorney, and that power of sentence was with the court only. The statement reflects that petitioner, with "0" prior convictions, could have received a sentence of from 5-50 [years] or life imprisonment and/or a fine of up to $15,000. [See, Ark. Stat. Ann. §41-1502(3); §41-901(1)(a);

§41-1101(1)(a) (Repl. 1977)]. [8] The statement also advised petitioner that, if he was guilty, he could plead guilty and the judge would decide what the sentence would be. (Joint Appendix 28-29).

At the sentencing hearing held that same date, the State deputy prosecuting attorney *recommended* to the trial court that a total sentence of 35 years be imposed. That negotiated plea (35 years for murder in the first degree and 10 years for theft of property, sentences to run concurrently) was recommended in exchange for petitioner's plea of guilty. (Joint Appendix 66-67). In Arkansas, the prosecutor's recommendation regarding a negotiated plea is not binding on the trial court. Ark.R.Crim.P. 25.3, Ark. Stat.

Ann. Vol. 4A (Repl. 1977). [9] See also, *Mabry v. Johnson*, ____ U.S. ____, 104 S.Ct. 2543, n. 5, 81 L.Ed.2d 437 (1984) (under Arkansas law, recommended sentence does not bind the trial court).

Petitioner advised the trial court that he wanted to plead guilty with the negotiated sentence in mind and stated on the record that he was guilty. (Joint Appendix 67). Upon being questioned by the judge, petitioner acknowledged his signature appeared on the bottom of the plea statement; his attorney had explained the statement to him; he understood the statement and had no questions about it; and no threats or promises had been made to get him to enter the plea of guilty, other than the negotiated plea. (Joint Appendix 67-68). Petitioner then, in his own words, described the circumstances of the murder and theft, stating he shot the victim with the victim's pistol, a

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Ark. Stat. Ann. §41-1502 (3) (Repl. 1977) provides:

* * *

(3) Murder in the first degree is a class A felony.

Ark. Stat. Ann. §41-901 (1) (a) (Repl. 1977) provides:

(1) A defendant convicted of a felony may be sentenced to a term of imprisonment:

(a) not less than five (5) years nor more than fifty (50) years, or life, if the conviction is of a class A felony;
* * *

Ark. Stat. Ann. §41-1101 (1) (a) (Repl. 1977) provides:

(1) A defendant convicted of a felony may be sentenced to pay a fine:

(a) not exceeding $15,000, if the conviction is of a class A or B felony;
* * *

9
Pursuant to Ark.R.Crim. P. 25.1, 25.3, Ark. Stat. Ann. Vol 4A (Repl. 1977) a plea agreement is not binding on the trial judge but the court may permit the agreement to be disclosed to him and may concur therein:

RULE 25.1 Propriety of Plea Discussions and Plea Agreements.

(a) In cases in which it appears that it would serve the interest of the public in the effective administration of justice, the prosecuting attorney may engage in plea discussions for the purpose of reaching a plea agreement. He shall engage in plea discussions and reach a plea agreement with the defendant only through defense counsel, except when the defendant has waived or refused his right to be represented by appointed or retained counsel.

(b) Similarly situated defendants shall be afforded equal opportunities for plea discussions and plea agreements.

* * *

RULE 25.3 Responsibilities of the Trial Judge.

(a) The judge shall not participate in plea discussions.

(b) If a plea agreement has been reached which contemplates entry of a plea of guilty or nolo contendere in the expectation that the charge or charges will be reduced, that other charges will be dismissed, or that sentence concessions will be granted, upon request of the parties the trial judge may permit the disclosure to him of the agreement and the reasons therefor in advance of the time for tender of the plea.

(c) If the parties have not sought the concurrence of the trial judge in a plea agreement or if the judge has declined to indicate whether he will concur in the agreement, he shall advise the defendant in open court at the time the agreement is stated that:

(i) the agreement is not binding on the court; and

(ii) if the defendant pleads guilty or nolo contendere the disposition may be different from that contemplated by the agreement.

(d) A verbatim record of all proceedings had in open court pursuant to subsections (b) and (c) of this rule shall be made and preserved by the court.

.36 derringer, and stole his car. (Joint Appendix 68-69). [10] Petitioner, on the record, waived his rights attendant to a trial by jury and acknowledged it was his decision to plead guilty to 35 years for murder and 10 years for theft of property after advising with his attorney. (Joint Appendix 69). Petitioner's plea of guilty was accepted by the judge and sentence, as reflected by the negotiated plea, was thereupon imposed. The only mention of parole was made by the trial court who, as indicated earlier, advised, after sentencing petitioner, that he would be required to serve *at least* one-third of his time before becoming eligible for parole. After being sentenced, petitioner indicated he had no questions about the plea or sentence or anything concerning his case. (Joint Appendix 69-70).

10

At the plea hearing, petitioner described his guilty conduct as follows:

THE COURT: Tell me shortly just in your own words what happened in this case? Where were you, first, the location?

DEFENDANT HILL: In Little Rock. We started out at a bar, the Gas Light, and he, Darrell Pitts, did something that I didn't like and it ended up in my shooting him and I stole his car. That is basically the run down of the facts.

THE COURT: These things that he did that you didn't like, was it necessary that you shoot him?

DEFENDANT HILL: I felt like it was.

THE COURT: Well, in what respect?

DEFENDANT HILL: Well, he hit me in the teeth with a gun. He also stabbed another person the same night and I just felt threatened by him. I am not saying I should have killed him but that was my way of solving the problem.

THE COURT: Where did you get the pistol?

DEFENDANT HILL: It was his pistol, a 36. Derringer.

THE COURT: Did you take it away from him?

DEFENDANT HILL: No. After he hit me in the teeth with it, when he got in the car he threw it at me and later on,after we took the other guy to the hospital, on the way back that is when I used it and shot him.

THE COURT: Did he have a pistol?

DEFENDANT HILL: No, your Honor. He had a knife.

THE COURT: Was he threatening you with a knife?

DEFENDANT HILL: He didn't have it pointed at me but he had it where it could have been used as a weapon against me.

THE COURT: Was he driving the car at the time you shot him?

DEFENDANT HILL: No. I was driving the car.

THE COURT: You were driving the car? Whose car was it?

DEFENDANT HILL: His car.

THE COURT: What did you do with him after you shot him?

DEFENDANT HILL: Put him in the Arkansas Traveler Motel. It was our room. We were working on a construction crew and being kept at that motel and then I took off and fled the state with his car and his gun.

THE COURT: How did you get him into the room?

DEFENDANT HILL: I carried him in, kinda drug him in.

Joint Appendix 68-69.

In Arkansas, a defendant, during post-conviction proceedings who fails to testify or allege he is not guilty, where he has previously admitted his guilt at the hearing on his entry of the plea of guilty, does not prove prejudice by his claim that counsel was ineffective. *Welch v. State*, 283 Ark. 281, 675 S.W.2d 641 (1984).

As is conclusively established by the state court record, neither the State, defense counsel, nor the circuit court made any promise to petitioner regarding eligibility for parole. [11] The plea agreement here was for a negotiated sentence *recommendation* by the State of 35 and 10 years, respectively. The plea hearing reflects the State honored its promise to petitioner. Thus, this is not a case in which a defendant relied on a promise made by a government attorney, and entered a plea of guilty, only to have the government breach the agreement to the defendant's detriment. Compare, *Santobello v. New York*, 404 U.S. 257 (1971); *Allen v. Cranor*, 45 Wash. 2d 25, 272 P.2d 153 (1954) (cited by petitioner but is thus distinguishable). Although the circuit court was not legally required to honor or accept the negotiated plea, it did so and sentenced petitioner accordingly.

Inasmuch as petitioner here was fully aware that the recommended sentence was not binding on the circuit court, counsel's advice regarding parole eligibility, even if erroneous on a statutory provision, amounts to no more than an estimate or prediction as to the sentence petitioner

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11

See, e.g., *Williams v. Wainwright*, 604 F.2d 404 (5th Cir. 1979) (record of plea hearing revealed defendant not promised anything other than 12 year sentence he actually received; although not conclusive, raised a "presumption of verity"); *Walden v. United States*, 418 F. Supp. 386 (E.D. Pa. 1976) (attorney advised defendant his cooperation might help; no promise made amounts to a prediction as to sentence); *United States v. Heldon*, 579 F.Supp. 1299 (E.D.Pa. 1984) (absent a plea agreement, plea is not involuntary merely because defendant relied upon inaccurate prediction of counsel as to sentence); *Hayes v. State*, 417 So.2d 579 (Ala. Cr. App. 1982) (defendant contended he understood and thought he would get probation when he pleaded guilty, but in executed plea statement he understood there were no agreements with the state; allegations characterized as result of fertile minds of cunning criminals); *Seiller v. United States*, 544 F.2d 554 (2d Cir. 1975) (defendant claimed he was advised by counsel to plead guilty and he would receive suspended sentence because of his ill health; even if true, mistaken estimate of sentence by defense counsel will not invalidate guilty plea).

would receive when he pleaded guilty. *United States v. Boniface*, 601 F.2d 390 (9th Cir. 1979) (attempting to set aside his guilty plea entered in federal district court, defendant contended, and defense counsel admitted, that counsel suggested plea be entered to a particular count while under misapprehension that count carried maximum sentence of five years; but record of plea hearing was conclusive that district court not bound by government's recommendation and thus plea not vitiated because of counsel's erroneous advice); *Wellnitz v. Page*, 420 F.2d 935 (10th Cir. 1970) (defense counsel and state's attorney agreed on 25 year sentence but judge sentenced defendant to 100 years; an attorney may offer his client sentence possibilities but absent reckless promise of a specific sentence or an assurance of leniency, defendant's erroneous expectation, based upon erroneous estimate by counsel does not render plea involuntary); *Hollis v. United States*, 687 F.2d 257 (8th Cir. 1982), cert. denied 103 S.Ct. 1228 (1983) (pursuant to a 28 U.S.C. §2255 petition, defendant contended his attorney told him maximum sentence he would receive would be five years but failed to inform him of maximum sentence under statute; plea not set aside as involuntary where defendant has been informed that sentencing rests in discretion of trial court, he understood negotiated plea and no promises made to him other than the plea agreement).

Such an erroneous prediction by defense counsel does not render petitioner's plea involuntary since, as a patently clear factual matter, petitioner was not falsely induced to plead guilty. In other words, since petitioner did not know if the circuit court would accept the recommended sentence of 35 years, he could not justifiably predicate his decision to plead guilty on a promise that he would be eligible for parole after one-third of that term (six years) as opposed to

one-half of that term (nine years), with credit for maximum good time. [12]

Until the state's recommended sentence and petitioner's plea of guilty were accepted by the circuit court and he was sentenced, a starting date for parole eligibility did not even come into play. As recognized in *Mabry v. Johnson*, ____ U.S. ____, 104 S.Ct. 2543, 2546, 81 L.Ed.2d 437, 442 (1984), "A plea bargain standing alone is without constitutional significance; in itself it is a mere executory agreement which, until embodied in the judgment of a court, does not deprive an accused of liberty or any other constitutionally protected interest."

Of course, respondent does not concede that parole eligibility was part of petitioner's negotiated plea in this case. But even so, the circuit court was free to reject the bargain and sentence petitioner within the maximum range

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12

Computation of petitioner's sentence, with respect to the numerical prediction under the applicable parole eligibility law was discussed by the district court as follows:

> "... The court was entirely correct in stating, *after accepting the plea of guilty*, that the defendant would have to serve *at least* one-third of his sentence before becoming eligible for parole. Strictly speaking, that would entail a term of approximately 12 years (one-third of 35 years). If the one-third rule applied to the petitioner, and he accrued maximum good time (one month for each month served [Ark. Stat. Ann. §§46-120-46-120.5 (Repl. 1977)], he could have been eligible for parole in six years. As it now stands, the one-half rule applies and, coupled with maximum good time, he could be eligible for parole in nine years. Nine years is actually *less* than one-third of the actual sentence imposed, yet the Court would be appalled if the state contended that, because the judge stated that the petitioner had to serve *at least* one-third of his sentence, the petitioner had to actually serve 12 years. The petitioner wants the bargain to cut but one way, his way, and thus one of the 'many flaws in the plea bargaining system is exposed.'" (Petition for Writ of Certiorari, Appendix A 11-12).

under Arkansas law. Thus, petitioner's expectation amounted to no more than a subjective belief of what his sentence would be, coupled with a hope for leniency. [13] A concurrent sentence of 35 years for two crimes when petitioner could have been sentenced to 50 years or life imprisonment on the first degree murder charge alone compels the conclusion that petitioner's goal in pleading guilty was to avoid a harsh sentence, not his desire to be eligible for parole after serving one-third of his time. [14]

Respondent strongly contends that the district court and Court of Appeals were correct in holding that parole eligibility after serving one third of petitioner's sentence was not a part of the negotiated plea bargain and thus, did not form the basis or any inducement for petitioner's plea of guilty on which he can be said to have relied. (Petition for Writ of Certiorari, Appendix A 2-3; Appendix B 5). That petitioner was induced by the alleged misadvice of defense counsel appears to be the main thrust of petitioner's brief

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13

The Fifth Circuit Court of Appeals has held that the subjective belief of a defendant is not sufficient ground for setting aside a plea of guilty. See, e.g., *Grantling v. Balkcom*, 632 F.2d 1261 (5th Cir. 1980) (state habeas petition, defendant's subjective belief he would not get a fair trial not sufficient to invalidate a guilty plea); *Matthews v. United States*, 569 F.2d 941 (5th Cir. 1978), cert. denied, 439 U.S. 1046 (1978) (federal habeas petition; defendant contended he failed to speak up at plea hearing because he was afraid of judge's hostile attitude, would refuse his plea or he might get a harsher sentence; subjective belief insufficient to invalidate guilty plea).

In *United States v. Henderson*, 565 F.2d 1119 (9th Cir. 1977), cert. denied, 435 U.S. 955 (1978) defendant contended the government's attorney promised him four years maximum sentence, to run concurrent with another sentence he was serving. Defendant here understood sentence was within discretion of judge and thus, a disappointed hope for leniency, without more, does not render a guilty plea invalid.

14

Petitioner does not dispute the fact that he had a prior conviction at the time he entered his guilty plea.

on the merits. Petitioner cites several cases in which it was indicated that a guilty plea must be set aside in such cases or an evidentiary hearing is necessary to determine the credibility of a defendant's allegations of misrepresentation. See, e.g., *United States v. Ternullo*, 510 F.2d 844 (2d Cir. 1975); *People v. Owsley*, 66 Ill. App. 3d 234, 383 N.E.2d 271 (1978); *ExParte Young*, 644 S.W.2d 3 (Tex. Cr. App. 1983). [15] The dissenting opinion of the Court of Appeals decision below expressed a similar view. (Petition of Writ of Certiorari, Appendix B 12: "The collateral consequences rule should not bar an ineffective assistance of counsel claim, however, where an attorney's misadvice respecting a collateral consequence induces a defendant to plead guilty.")

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In addition see, *McBryar v. McElroy*, 510 F.Supp. 706 (N.D. Ga. 1981) (defendant, who pleaded guilty contended his attorney advised him that if he cooperated he would receive probation; defendant sentenced to seven years; should have held evidentiary hearing, for guilty plea induced by assurances of defense counsel); *United States v. Unger*, 665 F.2d 251 (8th Cir. 1981) appeal after remand, 700 F.2d 445 (8th Cir. 1981), cert. denied, 104 S.Ct. 339 (1983) (defendant contended guilty plea not voluntary because defense attorney told her she would receive probation; allegations found to be credible that guilty plea was induced by misrepresentation).

Compare, *Griffin v. Martin*, 278 S.Car. 620, 300 S.E.2d 482 (1983) (defendant advised by defense counsel he would be eligible for parole in 10 years if he pleaded guilty but under state law, not eligible for 20 years; parole eligibility a collateral consequence of a guilty plea and defendant failed to prove reliance at post-conviction hearing); *Trevino v. State of Arizona*, 527 F.2d 439 (9th Cir. 1975) (attorney told defendant he would be eligible for parole within 7 years but under state law not eligible for parole unless sentence commuted; after full habeas hearing, court concluded plea motivated by desire to avoid death penalty and resulted from negotiated plea); *State v. Perez*, 654 P.2d 708 (Wash. App. 1982) (defendant contended she pleaded guilty because prosecutor advised she would be promptly considered eligible for parole but when defendant got to prison, found out she was not eligible for intensive parole; after hearing on motion to withdraw plea, determined that plea not so much induced by agreement but by misplaced hope of eligibility for intensive parole; counsel not ineffective, just optimistic).

That position, as well as petitioner's allegations in his habeas petition should be rejected as conclusively disputed by the verity of the state court record of the plea hearing. (See petitioner's allegations in his habeas petition, Joint Appendix 8-9). *McMann v. Richardson, supra; Brown v. Perini, supra.*

Petitioner executed a plea statement and thereafter, acknowledged his signature thereon to the trial court. Petitioner, in open court, advised he had no question regarding the statement, admitted his guilt and entered his plea on the record. Petitioner thus should not be permitted to set aside his "[s]olemn declarations [made] in open court. . . ." *Blackledge v. Allison*, 431 U.S. at 74.

IV.

In *Tollett v. Henderson*, 411 U.S. 258 (1973) the Court acknowledged that the general rule for governing collateral attacks on convictions based on guilty pleas had been set forth in *McMann v. Richardson*, 397 U.S. 759 (1970). As stated in *McMann*, a habeas petitioner who has pleaded guilty with the advice of counsel must demonstrate that advice was not "within the range of competence demanded of attorneys in criminal cases, . . ." not whether counsel's advice, in retrospect, was right or wrong. *Tollett v. Henderson*, 411 U.S. at 264, 266, citing *McMann v. Richardson*, 397 U.S. at 770-771. The Court observed that "[t]he focus of federal habeas inquiry is the nature of the advice and the voluntariness of the plea, . . . " *Tollett v. Henderson*, 411 U.S. at 266.

Recently in *Strickland v. Washington*, ___ U.S. ___, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) this Court announced a two component standard for assessing a defendant's challenge to his attorney's representation at trial.

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Id.* at 1045 S.Ct. at 2064, 80 L.Ed.2d 693.

In articulating these standards, the Court rejected the notion that more specific guidelines were appropriate. *Id.* at 104 S.Ct. 2065, 80 L.Ed.2d at 693. Observing that the purpose of the Sixth Amendment guarantee of effective assistance is to ensure that criminal defendants receive a fair trial, it was expressed that counsel's conduct must be judged on the facts of a particular case viewed at the time of counsel's conduct. As to the prejudice component, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 104 S.Ct. 2068, 80 L.Ed.2d at 698.

Respondent notes that the standards set forth in *Strickland* are indicated to apply to ordinary trials where the focus of a claim of ineffective assistance is on specific errors and omissions rather than counsel's performance as a whole. *Strickland v. Washington*, 104 S.Ct. at 2064, 80 L.Ed.2d at 693; *United States v. Cronic*, ___ U.S. ___, 104 S.Ct. 2039, 80 L.Ed. 657, n. 20 (1984). It is submitted, however, that the two component, performance and prejudice standard can be said to embellish the standard previously announced in *McMann v. Richardson, supra.* If the prejudice component has not previously been clearly applicable to collateral attacks on guilty pleas, respondent strongly urges the Court to extend that premise here. Public policy favoring finality of judgments in criminal cases, especially those which have come about by entry of a

guilty plea on a presumptively conclusive hearing record, compel this result. [16]

Assuming, *arguendo*, that defense counsel herein misadvised petitioner regarding his eligibility for parole, petitioner here cannot compel a determination that he was prejudiced. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland v. Washington*, ____ U.S. ____, 104 S.Ct. at 2067, 80 L.Ed.2d at 696 (1984).

The district court, as well as the Court of Appeals, concluded that even if defense counsel had misadvised petitioner, that fact does not render counsel's performance constitutionally inadequate. (Petition for Writ of Certiorari, Appendix A 10; Appendix B 5-7). As indicated by the cases relied upon in both opinions and those discussed, *infra*, respondent asserts that this position reflects the better rule of law, to-wit, parole eligibility is not a direct consequence of a plea of guilty. Thus, advice thereon should not be held as rendering a plea involuntary where the state court record presumptively establishes the advice was not part of the plea bargain or induced the plea. Likewise important, the recommended sentence was not binding on the trial court and thus the issue of parole eligibility amounts to no more than a sentence estimate by counsel on which the defendant based his erroneous expectation and a hope for leniency. *Brown v. Perini*, *supra*; *Little v. Allsbrook*, *supra*. Respondent is aware of no case law precedent which indicates that all terms and conditions discussed in the plea bargaining process, whether between defense counsel and his client, or even those discussed with the state's attorney,

16

See also, *United States v. Frady*, 456 U.S. 152 (1982) (collateral attack brought pursuant to 28 U.S.C. §2255 in federal court; proper standard for review is "cause and actual prejudice"); *Engle v. Isaac*, 456 U.S. 107 (1982) (procedural default in habeas cases must satisfy "cause" and "prejudice" standard).

can be held to have induced a plea of guilty. Such a precedent will be set by this case if habeas relief is granted to the petitioner.

As established by the state court record, this is not a case in which the defendant was not accurately advised regarding the minimum and maximum range of punishment which could be imposed, nor does he make such a claim. Compare, *Lewellyn v. Wainwright*, 593 F.2d 15 (5th Cir. 1979) (defendant in state court proceeding not advised regarding maximum sentence; plea was involuntary since sentence was a direct consequence of the plea). Neither is this a case in which counsel erred in advising his client on an issue of law which exposed the defendant to a mistaken belief regarding a harsher sentence if he were tried and thereby caused him to forego his right to a jury trial. See, e.g., *Cooks v. United States*, 461 F.2d 530 (5th Cir. 1972) (error in indictment and defense counsel's misinterpretation of it led defendant to believe maximum sentence range was 60 years when it was 10 years; counsel's error on the law was held to be gross misadvice and counsel rendered ineffective); *Hammond v. State*, 528 F.2d 15 (4th Cir. 1975) (similar facts); *United States v. Rumery*, 698 F.2d 764 (5th Cir. 1983) (similar facts). Nor did petitioner here rely on counsel's error of law thereby causing him to unknowingly waive a constitutionally protected right. *United States ex rel. Healey v. Cannon*, 553 F.2d 1052 (7th Cir. 1977) (defense counsel advised defendant his guilty plea would not preclude appellate review of admissibility of evidence; since appellate review waived by plea, guilty plea held not voluntarily and intelligently entered). Even an incorrect statement of the law as to sentencing range where the defendant was not prejudiced thereby has been held to not vitiate a guilty plea. *Hill v. Estelle*, 653 F.2d 202 (5th Cir. 1981), cert. denied 454 U.S. 1036 (1981) (defendant contended he was not advised on range of punishment in new state criminal code; but recommended sentence well above minimum sentence which served no limiting effect on parole eligibility; counsel not ineffective for failure to advise on an issue of law).

The issue here concerns petitioner's eligibility for parole. Respondent is cognizant of this Court's recognition "that a prisoner's eligibility for reduced imprisonment is a significant factor entering into both the defendant's decision to plea bargain and the judge's calculation of the sentence to be imposed." *Weaver v. Graham*, 450 U.S. 24, 32 (1981) (state statute reducing good time credits violated ex post facto clause), citing *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974); *Warden v. Marrero*, 417 U.S. 653, 658 (1974). But, recognizing the subjective variables and the assessment of a "multiplicity of imponderables" that factor into the parole release decision, the Court has specifically held that "[t]here is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence." *Greenholtz v. Inmates of Nebraska Penal & Cor.*, 442 U.S. 1, 7, 10 (1979). In *Greenholtz*, the Nebraska parole procedure which afforded an inmate an opportunity to be heard when denied parole, was approved as complying with due process. It was indicated that the possibility of parole provides an inmate with nothing more than the mere hope that the benefit will be obtained, an interest no more substantial than the hope that he will not be transferred to another prison, neither of which is protected by due process. *Id.* at 11.

Similarly, the applicable statutory provisions regarding parole in Arkansas provide for petitioner's *eligibility* for parole. Ark. Stat. Ann. §§43-2828(2); 43-2829

(Repl. 1977).[17] Thus, petitioner herein possessed not the right but the possibility of parole pursuant to Arkansas law. *Robinson v. Mabry*, 476 F.Supp. 1022 (E.D. Ark. 1979). Petitioner's expectation that he would be eligible for parole after serving one-third of his time when, under statute, he is not eligible for parole until serving one-half, did not work to lengthen the duration of his sentence. That expectation amounts to no more than the mere denial of parole which, it has been held, does not increase a convicted defendant's sentence. *Roach v. Ark. Bd. of Pardons & Paroles*, 503 F.2d

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17
Ark. Stat. Ann. §43-2828 (2) (Repl. 1977) provides:

> 43-2828. Classification of inmates. — For the purposes of this Act [§§43-2828 — 43-2833], inmates shall be classified as follows:
>
> • • •
>
> (2) Second offenders shall be inmates convicted of two or more felonies and who have been once incarcerated in some correctional institution in the United States, whether local, state or federal, for a crime which was a felony under the laws of the jurisdiction in which the offender was incarcerated, prior to being sentenced to a correctional institution in this State for the offense or offenses for which they are being classified.

Ark. Stat. Ann. §43-2829 B.(3) (Repl. 1977) provides:

> 43-2829. Parole eligibility. —
>
> • • •
>
> B. Persons who commit felonies on and after April 1, 1977, and shall be convicted and incarcerated for the same, shall be eligible for release on parole as follows: • • •
>
> (3) Inmates classified as second offenders under this Act upon entering a correctional institution in this State under sentence from a circuit court shall not be eligible for release on parole until a minimum of one-half (½) of their sentence shall have been served, with credit for good time allowances, or one-half (½) of the time to which sentence is commuted by executive clemency, with credit for good time allowances.

1367 (8th Cir. 1974) (denial of parole has effect of maintaining status quo); *Page v. United States Parole Commission*, 651 F.2d 1083, 1085 (5th Cir. 1981) (denial of parole merely requires the petitioner to serve out the length of his sentence).

In *United States v. Addonizio*, 442 U.S. 178 (1979) this Court held that changes in parole policies affect the manner in which judgment and sentence are to be performed, not the lawfulness of the judgment itself. There, the district judge sentenced the defendant to a term of years with the expectation that the defendant would be released after serving one-third of his sentence. After the defendant's incarceration, the parole policies were changed and defendant was denied release. In denying federal habeas relief, it was held that defendant's challenge to his sentence did not satisfy the established standards of collateral attacks on a judgment. The sentence imposed was within statutory limits and thus, the proceeding was not infected with an error of fundamental magnitude. [18]

Petitioner here bargained for 35 years imprisonment, and that is the sentence that was imposed. Whether petitioner is eligible for parole after serving one-third of that term, or one-half, that is the term he must serve. Administrative changes in the parole eligibility rules can still affect the date of petitioner's ultimate release subject, of course, to the petitioner's behavior and other subjective

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18

In Arkansas, a prisoner's challenge to his parole eligibility date will not be considered in post-conviction proceedings. *Bargo v. Lockhart, Director*, 279 Ark. 180, 650 S.W.2d 227 (1983).

criteria. [19] Those changes, however, will not affect the judgment of 35 years imprisonment to which petitioner has been sentenced. Petitioner here wants the 35 year sentence and an early releast eligibility date. He is not entitled to have the bargain "cut but one way, his way," however, as noted by the district court below. (Petition for Writ of Certiorari, Appendix A 12).

Respondent has chosen to discuss the impact of parole eligibility on the issue of competency of counsel. The principles discussed herein, however, lend themselves well to the discussion, *infra*, that advice regarding parole eligibility amounts to nothing more than a sentence estimate by defense counsel which is not binding on the court any more than a negotiated sentence recommended by the state.

In conclusion, respondent asserts that petitioner was not prejudiced by counsel's advice, even if rendered in error on an accessible statutory provision. [20] To hold otherwise would leave room for claims that an attorney's failure to correctly advise on a matter contained in an applicable statute renders counsel incompetent per se and thereby, a defendant is presumed to have been prejudiced.

19

In *Parker v. Corrothers*, 750 F.2d 653 (8th Cir. 1984) reh. denied (1985) the Eighth Circuit Court of Appeals reaffirmed the holding that Arkansas' parole statutes do not create a constitutionally protected liberty interest. The Court of Appeals did conclude, however, that a liberty interest was created in a specific parole regulation regarding considerations reviewed by the Parole Board. The application and assessment of parole regulations are not at issue here.

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The Court in *Strickland v. Washington*, ___ U.S. ___, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) indicated that the performance and prejudice components of the standards set forth may be assessed in any particular order, or that both need not be assessed if the defendant makes an insufficient showing on one. "The object of an ineffectiveness claim is not to grade counsel's performance." 104 S.Ct. at 2070, 80 L.Ed.2d at 669.

This Court has affirmatively recognized that criminal convictions should be accorded finality and that the presumption of finality is at its strongest in collateral attacks on judgments in criminal cases. *Blackledge v. Allison, supra; Strickland v. Washington, supra.* Those principles should be held to obtain no less to the facts of this case, especially on the strength of the state court record of petitioner's guilty plea and the mere expectation inherent in the administrative decision of parole release. As observed by the district court below, to hold otherwise, "would be to establish a basis for reopening every plea bargaining arrangement any time a defendant did not become eligible for parole at the time estimated by the attorneys or the court." (Petition for Writ of Certiorari, Appendix A 12). To grant petitioner habeas relief, or even to afford him an evidentiary hearing would, in this case, be inconsistent with this Court's most recent decisions involving collateral attacks on criminal convictions. *Strickland v. Washington, supra; Mabry v. Johnson, supra; United States v. Cronic, supra; United States v. Frady,* 456 U.S. 152 (1982). Accordingly, the relief requested by petitioner should be denied.

CONCLUSION

For the foregoing reasons supported by citations to legal authority, respondent prays that the judgment of the Eighth Circuit Court of Appeals be affirmed.

Respectfully submitted,

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